

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA

Plaintiff,

v.

THE OESER COMPANY

Defendant.

CIVIL ACTION NO. C05-1491C

CONSENT DECREE

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I. BACKGROUND AND FINDINGS

A. The United States of America (“United States”), on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), filed a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. §§ 9606 and 9607.

B. The United States in its complaint seeks, inter alia: (1) reimbursement of costs incurred by EPA and the Department of Justice for response actions at the Oeser Superfund Site near Bellingham, Washington, together with accrued interest; (2) assessment of penalties for failure to comply with the Unilateral Order issued on August 6, 1997 and (3) performance of studies and response work by the defendant at the Site consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended) (“NCP”).

C. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of Washington (the “State”) on December 17, 2003, of negotiations with potentially responsible parties regarding the implementation of the remedial design and remedial action for the Site, and EPA has provided the State with an opportunity to participate in such negotiations and be a party to this Consent Decree.

D. EPA has determined that The Oeser Company (hereafter, “Oeser” or Settling Defendant) has been the owner and operator of the Oeser property within the Oeser Site since the early 1940s. On July 2, 1997, EPA issued Oeser a letter notifying Oeser of potential liability. Settling Defendant does not admit any liability to the Plaintiff arising out of the transactions or occurrences alleged in the complaint, nor does it acknowledge that the release or threatened release of hazardous substances at or from the

1 Site constitutes an imminent or substantial endangerment to the public health or welfare or
2 the environment.

3 E. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the
4 Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by
5 publication in the Federal Register on September 25, 1997, 62 Fed. Reg. 50442.

6 F. In response to EPA's discovery of a release or a substantial threat of a
7 release of a hazardous substances at the Oeser property, EPA performed a time critical
8 removal action at the Oeser property and subsequently assumed the lead in preparing the
9 Remedial Investigation and Feasibility Study ("RI/FS") for the Site pursuant to 40 C.F.R.
10 § 300.430. The United States performed investigations into potential releases from, the
11 environmental conditions at, and potential risks to human health and the environment
12 resulting from the Oeser Superfund Site. EPA's work at the Oeser Superfund Site
13 involved the investigation and assessment of releases or potential releases in the soils and
14 groundwater on the Oeser Company property at the site, in the residential area near the
15 Oeser property, on the south slope and hiking path near the Oeser property, in the spoils
16 piles on the bank of Little Squalicum Creek, in surface water and sediments in Little
17 Squalicum Creek, in groundwater located off of the Oeser property, and from air
18 emissions from the Oeser property.

19 G. EPA completed a Remedial Investigation ("RI") Report in June of 2002
20 and EPA completed a Feasibility Study ("FS") Report in August of 2002.

21 H. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published
22 notice of the completion of the FS and of the proposed plan for remedial action on
23 December 13, 2002 in a major local newspaper of general circulation. EPA provided an
24 opportunity for written and oral comments from the public on the proposed plan for
25 remedial action. A copy of the transcript of the public meeting is available to the public as

1 part of the administrative record upon which the Regional Administrator based the
2 selection of the response action.

3 I. As a result of EPA's investigative work, including sampling both on and
4 off the Oeser property, EPA concluded that a release of hazardous substances which posed
5 a threat to human health and the environment had occurred on the Oeser property.

6 Accordingly, this Consent Decree requires the Settling Defendant to conduct certain Work
7 and O&M at the Site. In Section 8.1.1 of the ROD, the ROD states that estimated risks
8 based on dioxin/furan in soil and air were compared with soil and air samples obtained
9 from urban areas in Bellingham (background samples) not expected to be affected by
10 releases from Oeser. Results, as more fully described in the ROD, indicated that
11 estimated risks from dioxins/furans in soil and air are similar for residential area around
12 the facility and background area. In Section 5.4.3 of the ROD, the ROD states that during
13 the RI samples were collected during four quarterly sampling events from several deep
14 aquifer wells. Only a minor amount of contamination was found in the deep aquifer
15 directly under the treatment facility on the Oeser property. Samples from two wells
16 located next to the treatment facility in the center of the Oeser property exceeded the
17 preliminary screening levels for PCP. One well also had one slight exceedance of a
18 preliminary screening level for dioxins/furans. Generally, the extent and concentration of
19 contaminants appear to have decreased in the deep aquifer since 1995. No contaminants
20 were detected above preliminary screening levels in the deep groundwater samples
21 collected from nearby off-property areas including the South Slope area. Additional
22 groundwater monitoring will be ongoing.

23 J. The decision by EPA on the remedial action to be implemented at the Site
24 is embodied in a final Record of Decision ("ROD"), executed on September 18, 2003 on
25 which the State had a reasonable opportunity to review and comment. The ROD includes

1 a responsiveness summary to the public comments. Notice of the final plan was published
2 in accordance with Section 117(b) of CERCLA.

3 K. Based on the information presently available to EPA, EPA believes that the
4 Work will be properly and promptly conducted by the Settling Defendant if conducted in
5 accordance with the requirements of this Consent Decree and its appendices. The Parties
6 acknowledge that time is of the essence in implementing or conducting Work required by
7 this Consent Decree.

8 L. Solely for the purposes of Section 113(j) of CERCLA, the Remedial
9 Action selected by the ROD and the Work to be performed by the Settling Defendant shall
10 constitute a response action taken or ordered by the President.

11 M. The Parties recognize, and the Court by entering this Consent Decree finds,
12 that this Consent Decree has been negotiated by the Parties in good faith and
13 implementation of this Consent Decree will expedite the cleanup of the Site and will avoid
14 prolonged and complicated litigation between the Parties, and that this Consent Decree is
15 fair, reasonable, and in the public interest.

16 NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

17 II. JURISDICTION

18 1. This Court has jurisdiction over the subject matter of this action pursuant to
19 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also
20 has personal jurisdiction over the Settling Defendant. Solely for the purposes of this
21 Consent Decree and the underlying complaint, Settling Defendant waives all objections
22 and defenses that it may have to jurisdiction of the Court or to venue in this District.
23 Settling Defendant shall not challenge the terms of this Consent Decree or this Court's
24 jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree applies to and is binding upon the United States and upon Settling Defendant and its successors and assigns. Any change in ownership or corporate status of the Settling Defendant including, but not limited to, any transfer of assets or real or personal property, shall in no way alter such Settling Defendant's responsibilities under this Consent Decree.

3. Settling Defendant shall provide a copy of this Consent Decree and Appendices A (ROD) and B (SOW) to each contractor hired to perform the Work (as defined below) required by this Consent Decree and to each person representing the Settling Defendant with respect to the Site or the Work and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this Consent Decree. Settling Defendant or its contractors shall provide written notice of the Consent Decree to all subcontractors hired to perform any portion of the Work required by this Consent Decree. Settling Defendant shall nonetheless be responsible for ensuring that its contractors and subcontractors perform the Work contemplated herein in accordance with this Consent Decree. With regard to the activities undertaken pursuant to this Consent Decree, each contractor and subcontractor shall be deemed to be in a contractual relationship with the Settling Defendant within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

IV. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

1 “CERCLA” shall mean the Comprehensive Environmental Response,
2 Compensation and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

3 “Consent Decree” shall mean this Decree and all appendices attached hereto (listed
4 in Section XXIX). In the event of conflict between this Decree and any appendix, this
5 Decree shall control.

6 “Day” shall mean a calendar day unless expressly stated to be a working day.
7 “Working day” shall mean a day other than a Saturday, Sunday, or Federal holiday. In
8 computing any period of time under this Consent Decree, where the last day would fall on
9 a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of
10 the next working day.

11 “Effective Date” shall be the effective date of this Consent Decree as provided in
12 Section XXVII.

13 “EPA” shall mean the United States Environmental Protection Agency and any
14 successor departments or agencies of the United States.

15 “Future Response Costs” shall mean all costs, including, but not limited to, direct
16 and indirect costs, that the United States incurs in reviewing or developing plans, reports
17 and other items pursuant to this Consent Decree, verifying the Work, or otherwise
18 implementing, overseeing, or enforcing this Consent Decree, including, but not limited to,
19 payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to
20 Sections VII, IX (including, but not limited to, the cost of attorney time and any monies
21 paid to secure access and/or to secure or implement institutional controls including, but
22 not limited to, the amount of just compensation), XV, and Paragraph 87 of Section XXI.
23 In addition, Future Response Costs shall only include those Interim Response Costs that
24 are incurred pursuant to 42 U.S.C. §§ 9607(a) between June 24, 2005 and the Effective
25 Date.

1 “Interim Response Costs” shall mean all costs, including direct and indirect costs
2 (a) paid by the United States in connection with the Site between October 31, 2003 and
3 the Effective Date, or (b) incurred prior to the Effective Date but paid after that date.

4 “Interest,” shall mean interest at the rate specified for interest on investments of
5 the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded
6 annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The
7 applicable rate of interest shall be the rate in effect at the time the interest accrues. The
8 rate of interest is subject to change on October 1 of each year.

9 “National Contingency Plan” or “NCP” shall mean the National Oil and
10 Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105
11 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments
12 thereto.

13 “Operation and Maintenance” or “O & M” shall mean all activities required to
14 maintain the effectiveness of the Remedial Action as required under the Operation and
15 Maintenance Plan approved by EPA pursuant to this Consent Decree and the Statement of
16 Work (SOW).

17 “Oeser Property” or “Property” shall mean the property owned by The Oeser
18 Company encompassing approximately 26 acres, located at 730 Marine Drive, Whatcom
19 County, Washington.

20 “Oeser Site Special Account” shall mean the special account established for this
21 Site pursuant to Section 122(b)(3) of CERCLA.

22 “Paragraph” shall mean a portion of this Consent Decree identified by an arabic
23 numeral or an upper case letter.

24 “Parties” shall mean the United States and the Settling Defendant.
25

1 “Past Response Costs” shall mean all costs, including, but not limited to, direct
2 and indirect costs, that the United States paid at or in connection with the Site through
3 October 31, 2003, including but not limited to those costs included in demand letters and
4 cost summaries issued to Oeser dated June 30, 1998, April 26, 1999, December 17, 2003
5 and February 5, 2004, plus Interest on all such costs which has accrued pursuant to 42
6 U.S.C. § 9607(a) through such date.

7 “Performance Standards” shall mean the cleanup standards and other measures of
8 achievement of the goals of the Remedial Action as set forth in the ROD in Paragraphs
9 8.2, 8.3, 11.2 and 12.2.

10 “Plaintiff” shall mean the United States.

11 “RCRA” shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C.
12 §§ 6901 *et seq.* (also known as the Resource Conservation and Recovery Act).

13 “Record of Decision” or “ROD” shall mean the EPA Record of Decision relating
14 to the Oeser Site signed on September 18, 2003 by the Director of the Environmental
15 Cleanup Office, EPA Region 10, or his/her delegate, and all attachments thereto. The
16 ROD is attached as Appendix A.

17 “Remedial Action” shall mean those activities, except for Operation and
18 Maintenance, to be undertaken by the Settling Defendant to implement the ROD, in
19 accordance with the SOW and the final Remedial Design and Remedial Action Work
20 Plans and other plans approved by EPA.

21 “Remedial Action Work Plan” shall mean the document developed pursuant to
22 Paragraph 11 of this Consent Decree and SOW and approved by EPA, and any
23 amendments thereto.

1 “Remedial Design” shall mean those activities to be undertaken by the Settling
2 Defendant to develop the final plans and specifications for the Remedial Action pursuant
3 to the Remedial Design Work Plan.

4 “Remedial Design Work Plan” shall mean the document developed pursuant to
5 Paragraph 11 of this Consent Decree and SOW and approved by EPA, and any
6 amendments thereto.

7 “Section” shall mean a portion of this Consent Decree identified by a Roman
8 numeral.

9 “Settling Defendant” shall mean The Oeser Company.

10 “Site” or “Oeser Site” shall mean the Oeser Property and other adjacent areas
11 where a release of hazardous substances has come to be located. This definition
12 specifically encompasses the RI/FS Study Area, including but not limited to South Slope
13 and Little Squalicum Creek.

14 “State” shall mean the State of Washington.

15 “Statement of Work” or “SOW” shall mean the statement of work for
16 implementation of the Remedial Design, Remedial Action, and Operation and
17 Maintenance at the Site, as set forth in Appendix B to this Consent Decree and any
18 modifications made in accordance with this Consent Decree.

19 “Supervising Contractor” shall mean the principal contractor retained by the
20 Settling Defendant to supervise and direct the implementation of the Work under this
21 Consent Decree.

22 “United States” shall mean the United States of America.

23 “Waste Material” shall mean (1) any “hazardous substance” under Section 101(14)
24 of CERCLA, 42 U.S.C. § 9601(14) and (2) any pollutant or contaminant under
25 Section 101(33), 42 U.S.C. § 9601(33).

1 “Work” shall mean all activities Settling Defendant is required to perform under
2 this Consent Decree, except those required by Section XXV (Retention of Records).

3 V. GENERAL PROVISIONS

4 5. Objectives of the Parties. The objectives of the Parties in entering into this
5 Consent Decree are: (a) to protect public health and welfare and the environment at the
6 Site by the design and implementation of response actions at the Site by the Settling
7 Defendant; (b) to reimburse certain response costs of the Plaintiff; and (c) to resolve the
8 claims of Plaintiff against Settling Defendant as provided in this Consent Decree,
9 including, but not limited to claims for Past Response Costs, Interim Response Costs,
10 Future Response Costs and claims for penalties related to the Unilateral Order issued
11 pursuant to Section 106 of CERCLA on August 6, 1997.

12 6. Commitments by Settling Defendant. Settling Defendant shall finance and
13 perform the Work in accordance with this Consent Decree, the ROD, the SOW, and all
14 work plans and other plans, standards, specifications, and schedules set forth herein or
15 developed by Settling Defendant and approved by EPA pursuant to this Consent Decree.
16 Settling Defendant shall also reimburse the United States for certain Past Response Costs
17 and Future Response Costs, including certain Interim Response Costs, as provided in this
18 Consent Decree.

19 7. Compliance With Applicable Law. All activities undertaken by Settling
20 Defendant pursuant to this Consent Decree shall be performed in accordance with the
21 requirements of all applicable federal and state laws and regulations. Settling Defendant
22 must also comply with all applicable or relevant and appropriate requirements of all
23 Federal and state environmental laws set forth in the ROD and the SOW. The activities
24 conducted by Settling Defendant and its contractors pursuant to this Consent Decree, if
25 approved by EPA, shall be considered to be consistent with the NCP.

1 8. Permits.

2 a. As provided in Section 121(e) of CERCLA and Section 300.400(e)
3 of the NCP, no permit shall be required for any portion of the Work conducted entirely
4 on-site (i.e., within the areal extent of contamination or in very close proximity to the
5 contamination and necessary for implementation of the Work). Where any portion of the
6 Work that is not on-site requires a federal or state permit or approval, Settling Defendant
7 shall submit timely and complete applications and take all other actions necessary to
8 obtain all such permits or approvals. Nothing herein shall affect Oeser's obligations to
9 conduct its operations in compliance with the federal and state laws and regulations,
10 including, but not limited to Clean Air Act, Clean Water Act, Resource Conservation
11 Recovery Act and Washington State Dangerous Waste requirements.

12 b. The Settling Defendant may seek relief under the provisions of
13 Section XVIII (Force Majeure) of this Consent Decree for any delay in the performance of
14 the Work resulting from a failure to obtain, or a delay in obtaining, any permit required
15 for the Work.

16 c. This Consent Decree is not, and shall not be construed to be, a
17 permit issued pursuant to any federal or state statute or regulation.

18 9. Notice to Successors-in-Title.

19 a. With respect to any property owned or controlled by the Settling
20 Defendant that is located within the Site, within 15 days after the entry of this Consent
21 Decree, the Settling Defendant shall submit to EPA for review and approval a notice to be
22 filed with the Whatcom County Auditor or other appropriate office of Whatcom County,
23 State of Washington, which shall provide notice to all successors-in-title that the property
24 is part of the Site, and otherwise satisfy Paragraph 25.c of this Consent Decree, including
25 a statement that EPA selected a remedy for the Site on September 18, 2003, and that

1 Settling Defendant has entered into a Consent Decree requiring implementation of the
2 remedy. Such notice shall identify the United States District Court in which the Consent
3 Decree was filed, the name and civil action number of this case, and the date the Consent
4 Decree was entered by the Court. The Settling Defendant shall record the notice within 15
5 days of EPA's approval of the notice. The Settling Defendant shall provide EPA with a
6 copy of the recorded notice indicating that it has been duly recorded within 15 days of
7 receiving such a copy from the Whatcom County Auditor or other appropriate office.

8 b. At least 30 days prior to the conveyance of any interest in property
9 located within the Site including, but not limited to, fee interests, leasehold interests, and
10 mortgage interests, the Settling Defendant conveying the interest shall give the grantee
11 written notice of (i) this Consent Decree, (ii) any instrument by which a right of access to
12 the Site has been conveyed (hereinafter referred to as "access easements") pursuant to
13 Section IX (Access and Institutional Controls), and (iii) any instrument by which an
14 interest in real property has been conveyed that confers a right to enforce restrictions on
15 the use of such property (hereinafter referred to as "restrictive easements") pursuant to
16 Section IX (Access and Institutional Controls). At least 30 days prior to such conveyance,
17 the Settling Defendant conveying the interest shall also give written notice to EPA of the
18 proposed conveyance, including the name and address of the grantee, and the date on
19 which notice of the Consent Decree, access easements, and/or restrictive easements was
20 given to the grantee.

21 c. Settling Defendant may request that EPA amend this Consent
22 Decree to add subsequent purchaser(s) as a signatory to this Consent Decree, who will
23 then be subject to remaining terms, conditions and covenants of this Consent Decree.

24 d. In the event of any such conveyance, the Settling Defendant's
25 obligations under this Consent Decree, including, but not limited to, its obligation to

1 provide or secure access and institutional controls, as well as to abide by such institutional
 2 controls, pursuant to Section IX (Access and Institutional Controls) of this Consent
 3 Decree, shall continue to be met by the Settling Defendant. In no event shall the
 4 conveyance release or otherwise affect the obligation of the Settling Defendant to comply
 5 with all provisions of this Consent Decree, absent the prior written consent of EPA. If the
 6 United States approves, the grantee may perform some or all of the Work under this
 7 Consent Decree.

8 VI. PERFORMANCE OF THE WORK BY SETTLING DEFENDANT

9 10. Selection of Supervising Contractor.

10 a. All aspects of the Work to be performed by Settling Defendant
 11 pursuant to Sections VI (Performance of the Work by Settling Defendant, VII (Remedy
 12 Review), VIII (Quality Assurance, Sampling and Data Analysis), and XV (Emergency
 13 Response) of this Consent Decree shall be under the direction and supervision of the
 14 Supervising Contractor. Settling Defendant has notified EPA in writing of the name, title,
 15 and qualifications of the contractor proposed to be the Supervising Contractor, namely
 16 ReTec. With respect to any contractor proposed to be Supervising Contractor, Settling
 17 Defendant shall demonstrate that the proposed contractor has a quality system that
 18 complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems
 19 for Environmental Data Collection and Environmental Technology Programs," (American
 20 National Standard, January 5, 1995), by submitting a copy of the proposed contractor's
 21 Quality Management Plan (QMP). The QMP has been prepared in accordance with "EPA
 22 Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B-01/002,
 23 March 2001)]. If at any time thereafter, Settling Defendant proposes to change a
 24 Supervising Contractor, Settling Defendant shall give such notice to EPA, and must obtain
 25

1 an authorization to proceed from EPA before the new Supervising Contractor performs,
2 directs, or supervises any Work under this Consent Decree.

3 b. If EPA disapproves a proposed Supervising Contractor, EPA will
4 notify Settling Defendant in writing. Settling Defendant shall then submit to EPA a list of
5 contractors, including the qualifications of each contractor, that would be acceptable to it
6 within 30 days of receipt of EPA's disapproval of the contractor previously proposed.
7 EPA will provide written notice of the names of any contractor(s) that it disapproves and
8 an authorization to proceed with respect to any of the other contractors. Settling
9 Defendant may select any contractor from that list that is not disapproved and shall notify
10 EPA of the name of the contractor selected within 21 days of EPA's authorization to
11 proceed.

12 c. If EPA fails to provide written notice of its authorization to proceed
13 or disapproval as provided in this Paragraph and this failure substantially interferes with
14 the Settling Defendant meeting one or more deadlines in a plan approved by the EPA
15 pursuant to this Consent Decree, Settling Defendant may seek relief under the provisions
16 of Section XVIII (Force Majeure) hereof.

17 11. Performance of the Work.

18 a. Settling Defendant shall implement remedial design, remedial
19 action and other activities in accordance with requirements, schedule and time frames set
20 forth in the Consent Decree and the SOW. The SOW is incorporated into this Consent
21 Decree and is enforceable under this Consent Decree.

22 b. Settling Defendant shall submit to EPA the deliverables as set forth
23 in the SOW and shall implement the approved deliverables in accordance with the
24 approved schedule for review and approval and Section XI (EPA Approval of Plans and
25 Other Submissions). The deliverables shall provide for implementation of the remedy set

1 forth in the ROD and achievement of the Performance Standards, in accordance with this
2 Consent Decree, the ROD and the SOW. Upon approval by EPA, the deliverables shall
3 be incorporated into and become enforceable under this Consent Decree.

4 c. Upon approval of each deliverable by EPA, Settling Defendant
5 shall implement the activities required under the approved deliverable. Unless otherwise
6 directed by EPA, Settling Defendant shall not commence any physical remedial design or
7 remedial action activities prior to approval of the relevant deliverable.

8 12. The Settling Defendant shall continue to implement the Work until the
9 Performance Standards are achieved and for so long thereafter as is required under this
10 Consent Decree.

11 13. Modification of the SOW or Related Work Plans.

12 a. If EPA determines that modification to the SOW and/or in the work
13 plans developed pursuant to the SOW is necessary to achieve and maintain the
14 Performance Standards or to carry out and maintain the effectiveness of the remedy set
15 forth in the ROD, EPA may require that such modification be incorporated in the SOW
16 and/or such work plans, provided, however, that a modification may only be required
17 pursuant to this Paragraph to the extent that it is consistent with the ROD and the remedy
18 selected in the ROD.

19 b. If Settling Defendant objects to any modification determined by
20 EPA to be necessary pursuant to this Paragraph, Settling Defendant may seek dispute
21 resolution pursuant to Section XIX (Dispute Resolution), Paragraph 67 (record review).
22 The SOW and/or related work plans shall be modified in accordance with final resolution
23 of the dispute.
24
25

1 c. Settling Defendant shall implement any work required by any
2 modifications incorporated in the SOW and/or in work plans developed pursuant to the
3 SOW in accordance with this Paragraph.

4 d. Nothing in this Paragraph shall be construed to limit EPA's
5 authority to require performance of further response actions as otherwise provided in
6 Sections VII (Remedy Review), XIV (Certification of Completion), XV (Emergency
7 Response) and XXI (Covenants Not To Sue by Plaintiff) of this Consent Decree.

8 14. Settling Defendant acknowledges and agrees that nothing in this Consent
9 Decree, the SOW, or the Remedial Design or Remedial Action Work Plans constitutes a
10 warranty or representation of any kind by Plaintiff that compliance with the work
11 requirements set forth in the SOW and the Work Plans will achieve the Performance
12 Standards.

13 15. a. Settling Defendant shall, prior to any off-Site shipment of Waste
14 Material that is generated pursuant to the Work from the Site to an off-Site waste
15 management facility, provide written notification to the relevant jurisdiction regulating the
16 receiving facility and to the EPA Project Coordinator of such shipment of Waste Material
17 and comply with relevant regulations. However, this notification requirement shall not
18 apply to any off-Site shipments when the total volume of all such shipments will not
19 exceed 10 cubic yards.

20 (1) The Settling Defendant shall include in the written notification the
21 following information, where available: (1) the name and location of the facility to which
22 the Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be
23 shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the
24 method of transportation. The Settling Defendant shall notify the state or relevant
25 jurisdiction in which the planned receiving facility is located of major changes in the

1 shipment plan, such as a decision to ship the Waste Material to another facility within the
2 same jurisdiction, or to a facility in another state or jurisdiction.

3 (2) The identity of the receiving facility and relevant jurisdiction will
4 be determined by the Settling Defendant following the award of the contract for Remedial
5 Action construction. The Settling Defendant shall provide the information required by
6 Paragraph 15.a as soon as practicable after the award of the contract and before the Waste
7 Material is actually shipped.

8 b. Before shipping any hazardous substances, pollutants, or
9 contaminants that are generated pursuant to the Work from the Site to an off-site location,
10 Settling Defendant shall obtain EPA's certification that the proposed receiving facility is
11 operating in compliance with the requirements of CERCLA Section 12 l(d)(3) and 40
12 C.F.R. 300.440. Settling Defendant shall only send hazardous substances, pollutants, or
13 contaminants from the Site to an off-site facility that complies with the requirements of
14 the statutory provision and regulations cited in the preceding sentence.

15 VII. REMEDY REVIEW

16 16. Periodic Review. Settling Defendant shall conduct any studies and
17 investigation as requested by EPA, in order to permit EPA to conduct reviews of whether
18 the Remedial Action is protective of human health and the environment at least every five
19 years as required by Section 121(c) of CERCLA and any applicable regulations. EPA's
20 request for studies and investigations, and Settling Defendant's objections thereto, are
21 expressly subject to the Dispute Resolution procedures of Section XIX below.

22 17. EPA Selection of Further Response Actions. If EPA determines, at any
23 time, that the Remedial Action is not protective of human health and the environment,
24 EPA may select further response actions for the Site in accordance with the requirements
25

1 of CERCLA and the NCP. EPA may require Settling Defendants to perform such further
2 response action in accordance with Paragraph 19.

3 18. Opportunity To Comment. Settling Defendant and, if required by
4 Sections 113(k)(2) or 117 of CERCLA, the public, will be provided with an opportunity to
5 comment on any further response actions proposed by EPA as a result of the review
6 conducted pursuant to Section 121(c) of CERCLA and to submit written comments for the
7 record during the comment period.

8 19. Settling Defendant's Obligation To Perform Further Response Actions. If
9 EPA selects further response actions for the Site and requires Settling Defendant to
10 perform such actions, the Settling Defendant shall undertake such further response
11 actions, subject to statutory defenses set forth in Section 107(b) of CERCLA, to the extent
12 that the reopener conditions in Paragraph 83 or Paragraph 84 (United States' reservations
13 of liability based on unknown conditions or new information) are satisfied. Settling
14 Defendant may invoke the procedures set forth in Section XIX (Dispute Resolution) to
15 dispute (1) EPA's determination that the reopener conditions of Paragraph 83 or
16 Paragraph 84 of Section XXI (Covenants Not To Sue by Plaintiff) are satisfied, (2) EPA's
17 determination that the Remedial Action is not protective of human health and the
18 environment, or (3) EPA's selection of the further response actions. Disputes pertaining to
19 whether the Remedial Action is protective or to EPA's selection of further response
20 actions shall be resolved pursuant to Paragraph 67 (record review).

21 20. Submissions of Plans. If Settling Defendant is required to perform the
22 further response actions pursuant to Paragraph 19, it shall submit a plan for such work to
23 EPA for approval in accordance with the procedures set forth in Section VI (Performance
24 of the Work by Settling Defendant) and shall implement the plan approved by EPA in
25 accordance with the provisions of this Decree.

VIII. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS

21. Settling Defendant shall use quality assurance, quality control, and chain of custody procedures for all samples in accordance with “EPA Requirements for Quality Assurance Project Plans (QA/R5)” (EPA/240/B-01/003, March 2001) “Guidance for Quality Assurance Project Plans (QA/G-5)” (EPA/600/R-98/018, February 1998), and subsequent amendments to such guidelines upon notification by EPA to Settling Defendant of such amendment. Amended guidelines shall apply only to procedures conducted after such notification. Prior to the commencement of any monitoring project under this Consent Decree, Settling Defendant shall submit to EPA for approval a Quality Assurance Project Plan (“QAPP”) that is consistent with the SOW and the NCP. Settling Defendant shall utilize appropriate guidance documents. If relevant to the proceeding, the Parties agree that validated sampling data generated in accordance with the QAPP(s) and reviewed and approved by EPA in the ordinary course and prior to any proceeding shall be admissible as evidence, without objection in any proceeding under this Decree. Settling Defendant shall make reasonable efforts to ensure that EPA personnel and its authorized representatives are allowed access at reasonable times to all laboratories utilized by Settling Defendant in implementing this Consent Decree. In addition, Settling Defendant shall ensure that such laboratories shall analyze all samples submitted by EPA pursuant to the QAPP for quality assurance monitoring. Settling Defendant shall make reasonable efforts to ensure that the laboratories it utilizes for the analysis of samples taken pursuant to this Decree perform all analyses according to accepted EPA methods. Accepted EPA methods consist of those methods which are documented in the “Contract Lab Program Statement of Work for Inorganic Analysis” and the “Contract Lab Program Statement of Work for Organic Analysis,” dated February 1988, and any amendments made thereto during the course of the implementation of this Decree; however, upon approval by EPA,

1 the Settling Defendant may use other analytical methods which are as stringent as or more
2 stringent than the CLP-approved methods. Settling Defendant shall ensure that all
3 laboratories it uses for analysis of samples taken pursuant to this Consent Decree
4 participate in an EPA or EPA-equivalent QA/QC program. Settling Defendant shall only
5 use laboratories that have a documented Quality System which compiles with
6 ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for
7 Environmental Data Collection and Environmental Technology Programs," (American
8 National Standard, January 5, 1995), and "EPA Requirement for Quality Management
9 Plans (QA/R-2)," (EPA/240/B-01/002, March 2001) or equivalent documentation as
10 determined by EPA. EPA may consider laboratories accredited under the National
11 Environmental Laboratory Accreditation Program (NELAP) as meeting the Quality
12 System requirements. Settling Defendant shall ensure that all field methodologies utilized
13 in collecting samples for subsequent analysis pursuant to this Decree will be conducted in
14 accordance with the procedures set forth in the QAPP approved by EPA.

15 22. Upon request, the Settling Defendant shall allow split or duplicate samples
16 to be taken by EPA or its authorized representatives. Settling Defendant shall notify EPA
17 not less than 30 days in advance of any sample collection activity unless shorter notice is
18 agreed to by EPA. In addition, EPA shall have the right to take any additional samples
19 that EPA deems necessary. Upon request, EPA shall allow the Settling Defendant to take
20 split or duplicate samples of any samples it takes as part of the Plaintiff's oversight of the
21 Settling Defendant's implementation of the Work.

22 23. Settling Defendant shall submit to EPA three (3) copies of the results of all
23 sampling and/or tests or other data obtained or generated by or on behalf of Settling
24 Defendant with respect to the Site and/or the implementation of this Consent Decree
25 unless EPA agrees otherwise. One of the three copies must be submitted as a hard copy.

1 24. Notwithstanding any provision of this Consent Decree, the United States
2 hereby retains all of its information gathering and inspection authorities and rights,
3 including enforcement actions related thereto, under CERCLA, RCRA and any other
4 applicable statutes or regulations.

5 IX. ACCESS AND INSTITUTIONAL CONTROLS

6 25. The Settling Defendant shall:

7 a. commencing on the date of lodging of this Consent Decree, provide
8 the United States and its representatives, including EPA and its contractors, with access at
9 all reasonable times to Settling Defendant's property at the Site, or such other property
10 that it owns, for the purpose of conducting any activity related to this Consent Decree
11 including, but not limited to, the following activities:

- 12 (1) Monitoring the Work;
- 13 (2) Verifying any data or information submitted to the United
14 States;
- 15 (3) Conducting investigations relating to contamination at or
16 near the Site;
- 17 (4) Obtaining samples;
- 18 (5) Assessing the need for, planning, or implementing
19 additional response actions at or near the Site;
- 20 (6) Assessing implementation of quality assurance and quality
21 control practices as defined in the approved Quality Assurance Project Plans;
- 22 (7) Implementing the Work pursuant to the conditions set forth
23 in Paragraph 87 of this Consent Decree;
- 24
- 25

1 (8) Inspecting and copying records, operating logs, contracts, or
2 other documents maintained or generated by Settling Defendant or its agents, consistent
3 with Section XXIV (Access to Information);

4 (9) Assessing Settling Defendant's compliance with this
5 Consent Decree; and

6 (10) Determining whether the Site or other property is being used
7 in a manner that is prohibited or restricted, or that may need to be prohibited or restricted,
8 by or pursuant to this Consent Decree;

9 b. commencing on the date of lodging of this Consent Decree, refrain
10 from using the Site, in any manner that would interfere with or adversely affect the
11 implementation, integrity, or protectiveness of the remedial measures to be performed
12 pursuant to this Consent Decree. Such restrictions include, but are not limited to, a
13 prohibition on any future residential or recreational use of Settling Defendant's property at
14 the Site and a prohibition on future use of groundwater for human consumption
15 underlying its property at the Site and will be specified in the document to be recorded
16 under Paragraph 25(c). The restrictions in said document will allow heavy and light
17 industrial, utility and other commercial uses, except those uses which result in exposure to
18 sensitive populations, including but not limited to the following types of uses which shall
19 be expressly prohibited: residential, whether single or multi-family; outdoor recreational,
20 whether as a principal or accessory use; childcare; schools; food handling, food
21 production, food services, restaurants or cafes; and agriculture. Such restrictions shall
22 require, for the Oeser Property, non-interference with the remedial measures (e.g., cap) to
23 be installed pursuant to the Consent Decree. When actions resulting in substantial impact
24 are proposed, such actions shall be conducted in accordance with an EPA approved work
25 plan, which approval shall not be unreasonably withheld, including restoration of any caps

1 or other remedial measures. These restrictive covenants or easements shall include a
2 mechanism for modifying such restrictions, subject to EPA approval which approval shall
3 not be unreasonably withheld; and

4 c. execute and record with the Whatcom County Auditor or other
5 appropriate land records office of Whatcom County, State of Washington, a restrictive
6 covenant or an easement, running with the land, to the extent possible under Washington
7 law, that grants the United States, on behalf of EPA, and its representatives (i) a right of
8 access for purposes of implementing Paragraph 25.a. of this Consent Decree and (ii) the
9 right to enforce the land/water use restrictions listed in Paragraph 25.b of this Consent
10 Decree. Within 45 days of entry of the Consent Decree, the Settling Defendant shall
11 submit to EPA for review and approval:

12 (1) A draft restrictive covenant or easement consistent with this Paragraph
13 25, and

14 (2) Evidence that shows existing monetary liens and encumbrances, if
15 any, applicable to the Property. If there are any, Settling Defendant
16 will use its best efforts to obtain a release or subordination to the
17 interest of EPA (except as to those liens or encumbrances which are
18 approved by EPA or when, despite best efforts, Settling Defendant is
19 unable to obtain release or subordination of such prior liens or
20 encumbrances).

21 Within 15 days of EPA's approval and acceptance of the restrictive covenant or easement
22 and the title evidence, the Settling Defendant shall update the title evidence and, if it is
23 determined that nothing has occurred since the effective date of the commitment to affect
24 the title adversely, record the easement with the Auditors Office of Whatcom County.

25 Within 30 days of recording the restrictive covenant or easement, the Settling Defendant

1 shall provide EPA with a certified copy of the original recorded restrictive covenant or
2 easement.

3 26. If the Site, or any other property where access and/or land/water use
4 restrictions are needed to implement this Consent Decree, is owned or controlled by
5 persons other than the Settling Defendant, Settling Defendant shall use best efforts to
6 secure from such persons an agreement to provide access thereto for Settling Defendant,
7 as well as for the United States on behalf of EPA and its representatives (including
8 contractors), for the purpose of conducting any activity related to this Consent Decree
9 including, but not limited to, those activities listed in Paragraph 25.a of this Consent
10 Decree.

11 27. For purposes of Paragraphs 25 and 26 of this Consent Decree, “best
12 efforts” includes the payment of reasonable sums of money in consideration of access,
13 access agreements, or restrictive covenant or easement. If (a) any access agreements or
14 restrictive covenant or easement required by Paragraph 25 of this Consent Decree are not
15 obtained within 90 days of the date of entry of this Consent Decree, or (b) any access
16 agreements required by Paragraph 26 of this Consent Decree are not submitted to EPA
17 within 30 days of EPA’s request for such access, Settling Defendant shall promptly notify
18 the United States in writing, and shall include in that notification a summary of the steps
19 that Settling Defendant has taken to attempt to comply with Paragraph 25 or 26 of this
20 Consent Decree. The United States may, as it deems appropriate, assist Settling
21 Defendant in obtaining access, restrictive covenants, easements or other land/water use
22 restrictions. Settling Defendant shall reimburse the United States in accordance with the
23 procedures in Section XVI (Payment for Response Costs), for all costs incurred, direct or
24 indirect, by the United States in obtaining such access, restrictive covenants, easements or
25 other land/water use restrictions, and/or the release/subordination of prior liens or

1 encumbrances including, but not limited to, the cost of attorney time and the amount of
2 monetary consideration paid or just compensation.

3 28. If EPA determines that land/water use restrictions in the form of state or
4 local laws, regulations, ordinances or other governmental controls are needed to
5 implement the remedy selected in the ROD, ensure the integrity and protectiveness
6 thereof, or ensure non-interference therewith, Settling Defendant shall cooperate with
7 EPA's efforts to secure such governmental controls. So long as Settling Defendant
8 cooperates, the failure to secure such restrictions shall not subject Settlement Defendant to
9 Stipulated Penalties under Section XX.

10 29. Notwithstanding any provision of this Consent Decree and without
11 prejudice to any defenses available to Settling Defendant, the United States retains all of
12 its access authorities and rights, as well as all of its rights to require land/water use
13 restrictions, including enforcement authorities related thereto, under CERCLA, RCRA
14 and any other applicable statute or regulations.

15 X. REPORTING REQUIREMENTS

16 30. In addition to any other requirement of this Consent Decree, Settling
17 Defendant shall submit to EPA three (3) copies of monthly progress reports that:
18 (a) describe the actions which have been taken toward achieving compliance with this
19 Consent Decree during the previous month; (b) include a summary of all results of
20 sampling and tests and all other data received or generated by Settling Defendant or its
21 contractors or agents in the previous month; (c) identify all work plans, plans and other
22 deliverables required by this Consent Decree completed and submitted during the previous
23 month; (d) describe all actions, including, but not limited to, data collection and
24 implementation of work plans, which are scheduled for the next six weeks and provide
25 other information relating to the progress of construction, including, but not limited to,

1 critical path diagrams, Gantt charts and Pert charts; (e) include information regarding
2 percentage of completion, unresolved delays encountered or anticipated that may affect
3 the future schedule for implementation of the Work, and a description of efforts made to
4 mitigate those delays or anticipated delays; (f) include any modifications to the work plans
5 or other schedules that Settling Defendant has proposed to EPA or that have been
6 approved by EPA; and (g) describe all activities undertaken in support of the Community
7 Relations Plan during the previous month and those to be undertaken in the next six
8 weeks. Settling Defendant shall submit these progress reports to EPA by the twentieth
9 day of every month following the lodging of this Consent Decree until EPA notifies the
10 Settling Defendant pursuant to Paragraph 49.b of Section XIV (Certification of
11 Completion of Remedial Action) or sooner as agreed to by EPA. Settling Defendant shall
12 thereafter provide quarterly progress reports by the end of the month following each
13 quarter, for an additional twelve months and thereafter annually until Certification of
14 Completion of the Work pursuant to Paragraph 50.b Section XIV. If requested by EPA,
15 Settling Defendant shall also provide briefings for EPA to discuss the progress of the
16 Work.

17 31. The Settling Defendant shall notify EPA of any change in the schedule
18 described in the monthly progress report for the performance of any activity, including,
19 but not limited to, data collection and implementation of work plans, no later than seven
20 days prior to the performance of the activity.

21 32. Upon the occurrence of any event during performance of the Work that
22 Settling Defendant is required to report pursuant to Section 103 of CERCLA or
23 Section 304 of the Emergency Planning and Community Right-to-Know Act (EPCRA),
24 Settling Defendant shall within 24 hours of the onset of such event orally notify the EPA
25 Project Coordinator or the Alternate EPA Project Coordinator (in the event of the

1 unavailability of the EPA Project Coordinator), or, in the event that neither the EPA
2 Project Coordinator or Alternate EPA Project Coordinator is available, the Emergency
3 Response Section, Region 10, United States Environmental Protection Agency. These
4 reporting requirements are in addition to the reporting required by CERCLA Section 103
5 or EPCRA Section 304.

6 33. Within 20 days of the onset of such an event, Settling Defendant shall
7 furnish to Plaintiff a written report, signed by the Settling Defendant's Project
8 Coordinator, setting forth the events which occurred and the measures taken, and to be
9 taken, in response thereto. Within 30 days of the conclusion of such an event, Settling
10 Defendant shall submit a report setting forth all actions taken in response thereto.

11 34. Settling Defendant shall submit three (3) copies of all plans, reports, and
12 data required by the SOW, the Remedial Design Work Plan, the Remedial Action Work
13 Plan, or any other approved plans to EPA in accordance with the schedules set forth in
14 such plans. One or more of the three copies must be a hard copy. Upon request by EPA,
15 Settling Defendant shall submit in electronic form all portions of any report or other
16 deliverable Settling Defendant is required to submit pursuant to the provisions of this
17 Consent Decree.

18 35. All reports and other documents submitted by Settling Defendant to EPA
19 (other than the monthly progress reports referred to above) which purport to document
20 Settling Defendant's compliance with the terms of this Consent Decree shall be signed by
21 an authorized representative of the Settling Defendant.

22 XI. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

23 36. After review of any plan, report or other item which is required to be
24 submitted for approval pursuant to this Consent Decree, EPA shall: (a) approve, in whole
25 or in part, the submission; (b) approve the submission upon specified conditions;

(c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that the Settling Defendant modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing Settling Defendant at least one notice of deficiency and an opportunity to cure within 21 days of Settling Defendant's receipt of such notice, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved due to material defects and deficiencies in the submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

37. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Paragraph 36(a), (b), or (c), Settling Defendant shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA subject only to their right to invoke the Dispute Resolution procedures set forth in Section XIX (Dispute Resolution) with respect to the modifications or conditions made by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Paragraph 36(c) and the submission has a material defect, EPA retains its right to seek stipulated penalties, as provided in Section XX (Stipulated Penalties).

38. Resubmission of Plans.

a. Upon receipt of a notice of disapproval pursuant to Paragraph 36(d), Settling Defendant shall, within 21 days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section XX, shall accrue but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 39 and 40.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 36(d), Settling Defendant shall proceed, at the direction of EPA, to take any

1 action required by any non-deficient portion of the submission. Implementation of any
2 non-deficient portion of a submission shall not relieve Settling Defendant of any liability
3 for stipulated penalties under Section XX (Stipulated Penalties).

4 39. In the event that a resubmitted plan, report or other item, or portion thereof,
5 is disapproved by EPA, EPA may again require the Settling Defendant to correct the
6 deficiencies, in accordance with the preceding Paragraphs. EPA also retains the right to
7 modify or develop the plan, report or other item. Settling Defendant shall implement any
8 such plan, report, or item as modified or developed by EPA, subject only to their right to
9 invoke the procedures set forth in Section XIX (Dispute Resolution).

10 40. If upon resubmission, a plan, report, or item is disapproved or modified by
11 EPA due to a material defect, Settling Defendant shall be deemed to have failed to submit
12 such plan, report, or item timely and adequately unless the Settling Defendant invokes the
13 dispute resolution procedures set forth in Section XIX (Dispute Resolution) and EPA's
14 action is overturned pursuant to that Section. The provisions of Section XIX (Dispute
15 Resolution) and Section XX (Stipulated Penalties) shall govern the implementation of the
16 Work and accrual and payment of any stipulated penalties during Dispute Resolution. If
17 EPA's disapproval or modification is upheld, stipulated penalties shall accrue for such
18 violation from the date after which the initial submission was originally required in
19 accordance with Section XX.

20 41. All plans, reports, and other items required to be submitted to EPA under
21 this Consent Decree shall, upon approval or modification by EPA, be enforceable under
22 this Consent Decree. In the event EPA approves or modifies a portion of a plan, report, or
23 other item required to be submitted to EPA under this Consent Decree, the approved or
24 modified portion shall be enforceable under this Consent Decree.
25

XII. PROJECT COORDINATORS

42. Settling Defendant and EPA hereby designate their respective designated Project Coordinators as follows:

- Linda Baker, Retec
The Retec Group Inc
1011 SW Klickitat Way
Suite 207
Seattle, WA 98134-1162
Phone: (206) 624-9349
Fax: (206) 624-2839
- Mary Jane Nearman, EPA
EPA Project Coordinator
1200 Sixth Avenue, ECL 115
Seattle, WA 98101
Phone: (206) 553-6642
Fax: (206) 553-0124

If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be given to the other Parties at least 5 working days before the changes occur, unless impracticable but in no event later than the actual day the change is made. The Settling Defendant's Project Coordinator shall be subject to disapproval by EPA and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. The Settling Defendant's Project Coordinator shall be an authorized representative of Settling Defendant but shall not be an attorney for the Settling Defendant in this matter. He or she may assign other representatives including other contractors to serve as a Site representative for oversight of performance of daily operations during remedial activities.

43. Plaintiff may designate other representatives, including, but not limited to, EPA employees, and federal contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree. EPA's Project Coordinator and Alternate Project Coordinator shall have the authority lawfully vested in

1 a Remedial Project Manager (RPM) and an On-Scene Coordinator (OSC) by the National
2 Contingency Plan, 40 C.F.R. Part 300. In addition, EPA's Project Coordinator or
3 Alternate Project Coordinator shall have authority, consistent with the National
4 Contingency Plan, to halt any Work required by this Consent Decree and to take any
5 necessary response action when s/he determines that conditions at the Site constitute an
6 emergency situation or may present an immediate threat to public health or welfare or the
7 environment due to release or threatened release of Waste Material.

8 44. EPA's Project Coordinator and the Settling Defendant's Project
9 Coordinator will meet, on a regular basis, at the Site (at least monthly during
10 construction), through Certification of Completion of the Remedial Action, as determined
11 by EPA.

12 XIII. ASSURANCE OF ABILITY TO COMPLETE WORK

13 45. Settling Defendant shall establish and maintain financial security in the
14 following forms:

15 a. Within 30 days of entry of this Consent Decree, a trust fund in the
16 amount of \$3,870,000.00, in substantially the form attached hereto as Appendix C,
17 equaling the total estimated cost of the Work, plus anticipated EPA oversight costs,
18 administered by the trustee, and governed by terms and conditions, acceptable in all
19 respects to the United States ("Trust Account"). The purpose of the Trust Account is to
20 provide a source of funds for performance of the response actions to be taken at or in
21 connection with the Site, including monitoring and maintenance of remedial actions,
22 reimbursement of EPA oversight costs and other appropriate expenses in accordance with
23 the Trust Agreement. The Trust Account shall not be used for payment of any penalties
24 assessed against Settling Defendant. Under the terms of the trust agreement, EPA can
25 object to a request for disbursement of funds from the Trust Account if it determines that

1 the conditions for distribution of funds have not been met. EPA will provide the trustee
2 with notice of the objection and instructions as to the distribution of the funds in the Trust
3 Account pursuant to the procedures set forth in the trust agreement. In the event EPA
4 assumes performance of all or any of the Work in accordance with Paragraph 87 of this
5 Consent Decree, EPA will provide instructions to the trustee regarding distribution of
6 funds in the Trust Account in accordance with the process set forth in the trust agreement;

7 b. Within 30 days of this Consent Decree, a control account in the
8 amount of \$2,108,180.86 pursuant to the Control Agreement attached hereto as Appendix
9 D ("Control Account"). The Control Account shall contain contingency funds which may
10 be used to purchase up to \$588,180.86 of insurance, including cost cap insurance under
11 subparagraph c. below. The contingency funds will also be available to be used to cover
12 the costs of response actions in accordance with the Control Agreement, including any
13 cost overruns in the implementation of the remedial action, costs of long term monitoring,
14 maintenance, and care, EPA oversight costs, and other EPA remedy related expenses. The
15 Control Account funds shall not be used for payment of any penalties assessed against
16 Settling Defendant. Under the terms of the Control Agreement, EPA can object to a
17 request for disbursement of funds from the Control Account if it determines that the
18 conditions for distribution of the funds have not been met. EPA will provide the bank
19 with notice of the objection and instructions as to the distribution of the funds in the
20 Control Account in accordance with the procedures set forth in the Control Agreement;
21 and

22 c. Subject to acceptable terms and market availability, within 45 days
23 of EPA's final approval of remedial engineering design documents and at least 20 days
24 prior to the start of remedial work, a signed binder for a policy of insurance, issued by an
25 insurance carrier and governed by terms and conditions, acceptable in all respects to the

1 United States. The United States shall be an additional named insured on such insurance
2 policy. In the event that Settling Defendant does not obtain insurance as provided in this
3 paragraph, Settling Defendant shall immediately transfer the balance remaining from the
4 \$588,180.86 set-aside for insurance from the Control Account described in Paragraph 45.b
5 above to the Trust Account described in Paragraph 45.a above.

6 46. In the event that EPA determines at any time that the financial assurances
7 provided pursuant to this Section are inadequate, Settling Defendant shall, within 60 days
8 of receipt of notice of EPA's determination, obtain and present to EPA for approval an
9 alternative form of financial assurance. Settling Defendant's inability to demonstrate
10 financial ability to complete the Work shall not excuse performance of any Work required
11 under this Consent Decree. Settling Defendant's inability to provide new and different
12 financial assurances shall not subject Settling Defendant to Stipulated Penalties under
13 Section XX.

14 47. If Settling Defendant can show that the estimated cost to complete the
15 remaining Work has diminished below the amount set forth in Paragraph 45 above after
16 entry of this Consent Decree, Settling Defendant may, on any anniversary date of entry of
17 this Consent Decree, or at any other time agreed to by the Parties, reduce the amount of
18 the financial security provided under this Section to the estimated cost of the remaining
19 work to be performed. Settling Defendant shall submit a proposal for such reduction to
20 EPA, in accordance with the requirements of this Section, and may reduce the amount of
21 the security upon approval by EPA. Settling Defendant may invoke the dispute resolution
22 procedures set forth in Section XIX if EPA fails to make a decision within thirty (30) days
23 of such request. In the event of a dispute, Settling Defendant may reduce the amount of
24 the security in accordance with the final administrative or judicial decision resolving the
25 dispute.

1 48. Settling Defendant may not change the form of financial assurance
2 provided under this Section except upon notice to and approval by EPA. In the event of a
3 dispute, Settling Defendant may change the form of the financial assurance only in
4 accordance with the final administrative or judicial decision resolving the dispute.

5 XIV. CERTIFICATION OF COMPLETION

6 49. Completion of the Remedial Action.

7 a. Within 90 days after Settling Defendant concludes that the
8 Remedial Action has been fully performed and the Performance Standards have been
9 attained, Settling Defendant shall schedule and conduct a pre-certification inspection to be
10 attended by Settling Defendant and EPA. If, after the pre-certification inspection, the
11 Settling Defendant still believes that the Remedial Action has been fully performed and
12 the Performance Standards have been attained, it shall submit a written report requesting
13 certification to EPA for approval pursuant to Section XI (EPA Approval of Plans and
14 Other Submissions) within 30 days of the inspection. In the report, a registered
15 professional engineer and the Settling Defendant's Project Coordinator shall state that the
16 Remedial Action has been completed in full satisfaction of the requirements of this
17 Consent Decree. The written report shall include as-built drawings signed and stamped by
18 a professional engineer. The report shall contain the following statement, signed by a
19 responsible corporate official of the Settling Defendant or the Settling Defendant's Project
20 Coordinator:

21 To the best of my knowledge, after thorough investigation, I certify that the
22 information contained in or accompanying this submission is true, accurate
23 and complete. I am aware that there are significant penalties for submitting
24 false information including the possibility of fine and imprisonment for
25 knowing violations.

1 If, after completion of the pre-certification inspection and receipt and review of the
2 written report, EPA determines that the Remedial Action or any portion thereof has not
3 been completed in accordance with this Consent Decree or that the Performance Standards
4 have not been achieved, EPA will notify Settling Defendant in writing of the activities that
5 must be undertaken by Settling Defendant pursuant to this Consent Decree to complete the
6 Remedial Action and achieve the Performance Standards, provided, however, that EPA
7 may only require Settling Defendant to perform such activities pursuant to this
8 Paragraph to the extent that such activities are consistent with the remedy selected in the
9 ROD. EPA will set forth in the notice a schedule for performance of such activities
10 consistent with the Consent Decree and the SOW or require the Settling Defendant to
11 submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans
12 and Other Submissions). Settling Defendant shall perform all activities described in the
13 notice in accordance with the specifications and schedules established pursuant to this
14 Paragraph, subject to their right to invoke the dispute resolution procedures set forth in
15 Section XIX (Dispute Resolution).

16 b. If EPA concludes, based on the initial or any subsequent report
17 requesting Certification of Completion that the Remedial Action has been performed in
18 accordance with the Consent Decree and that the Performance Standards have been
19 achieved, EPA will so certify in writing to Settling Defendant. This certification shall
20 constitute the Certification of Completion of the Remedial Action for purposes of this
21 Consent Decree, including, but not limited to, Section XXI (Covenants Not to Sue by
22 Plaintiff). Certification of Completion of the Remedial Action shall not affect Settling
23 Defendant's remaining obligations under this Consent Decree.

1 50. Completion of the Work.

2 a. Within 90 days after Settling Defendant concludes that all phases of
3 the Work (including O & M), have been fully performed, Settling Defendant shall
4 schedule and conduct a pre-certification inspection to be attended by Settling Defendant
5 and EPA. If after the pre-certification inspection, the Settling Defendant still believes that
6 the Work has been fully performed, Settling Defendant shall submit a written report by a
7 registered professional engineer stating that the Work has been completed in full
8 satisfaction of the requirements of this Consent Decree. The report shall contain the
9 following statement, signed by a responsible corporate official of the Settling Defendant
10 or the Settling Defendant's Project Coordinator:

11 To the best of my knowledge, after thorough investigation, I certify
12 that the information contained in or accompanying this submission is true,
13 accurate and complete. I am aware that there are significant penalties for
14 submitting false information, including the possibility of fine and
imprisonment for knowing violations.

15 If, after review of the written report, EPA determines that any portion of the Work has not
16 been completed in accordance with this Consent Decree, EPA will notify Settling
17 Defendant in writing of the activities that must be undertaken by Settling Defendant
18 pursuant to this Consent Decree to complete the Work, provided, however that EPA may
19 only require Settling Defendant to perform such activities pursuant to this Paragraph to the
20 extent that such activities are consistent with the remedy selected in the ROD. EPA will
21 set forth in the notice a schedule for performance of such activities consistent with the
22 Consent Decree and the SOW or require the Settling Defendant to submit a schedule to
23 EPA for approval pursuant to Section XI (EPA Approval of Plans and Other
24 Submissions). Settling Defendant shall perform all activities described in the notice in
25

1 accordance with the specifications and schedules established therein, subject to their right
2 to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

3 b. If EPA concludes, based on the initial or any subsequent request for
4 Certification of Completion by Settling Defendant that the Work has been performed in
5 accordance with this Consent Decree, EPA will so notify the Settling Defendant in
6 writing.

7 **XV. EMERGENCY RESPONSE**

8 51. In the event of any action or occurrence during the performance of the
9 Work that causes or threatens a release of Waste Material from the Site that constitutes an
10 emergency situation or may present an immediate threat to public health or welfare or the
11 environment, Settling Defendant shall, subject to Paragraph 52, immediately take all
12 appropriate action to prevent, abate, or minimize such release or threat of release, and
13 shall immediately notify the EPA's Project Coordinator, or, if the Project Coordinator is
14 unavailable, EPA's Alternate Project Coordinator. If neither of these persons is available,
15 the Settling Defendant shall notify the EPA Emergency Response Unit, Region 10.
16 Settling Defendant shall take such actions in consultation with EPA's Project Coordinator
17 or other available authorized EPA officer and in accordance with all applicable provisions
18 of the Health and Safety Plans, the Contingency Plans, and any other applicable plans or
19 documents developed pursuant to the SOW. In the event that Settling Defendant fails to
20 take appropriate response action as required by this Section, and EPA takes such action
21 instead, Settling Defendant shall reimburse EPA all costs of the response action not
22 inconsistent with the NCP pursuant to Section XVI (Payments for Response Costs)
23 subject to Section XIX (Dispute Resolution) as provided in this Consent Decree. Settling
24 Defendant's objections to the response actions taken pursuant to this paragraph are
25

1 expressly subject to the dispute resolution provisions of Section XIX of this Consent
2 Decree.

3 52. Nothing in the preceding Paragraph or in this Consent Decree shall be
4 deemed to limit any authority of the United States a) to take all appropriate action to
5 protect human health and the environment or to prevent, abate, respond to, or minimize an
6 actual or threatened release of Waste Material on, at, or from the Site, or b) to direct or
7 order such action, or seek an order from the Court, to protect human health and the
8 environment or to prevent, abate, respond to, or minimize an actual or threatened release
9 of Waste Material on, at, or from the Site, subject to Section XXI (Covenants Not to Sue
10 by Plaintiff) and without prejudice to any defenses available to Settling Defendant.

11 XVI. PAYMENTS FOR RESPONSE COSTS

12 53. Payments for Past Costs.

13 a. Within 30 days of the Effective Date, Settling Defendant shall pay
14 to EPA \$ 8,600,000.00 in payment for and satisfaction of all Past Response Costs and
15 Interim Costs through June 24, 2005. Payment shall be made by FedWire Electronic
16 Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with
17 current EFT procedures, referencing USAO File Number _____, EPA Site/Spill
18 ID Number 104T, and DOJ Case Number 90-11-2-07535. Payment shall be made in
19 accordance with instructions provided to the Settling Defendant by the Financial
20 Litigation Unit of the United States Attorney's Office for the Western District of
21 Washington following lodging of the Consent Decree. Any payments received by the
22 Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business
23 day.

b. At the time of payment, Settling Defendant shall send notice that payment has been made to the United States, to EPA and to the Regional Financial Management Officer, in accordance with Section XXVI (Notice and Submissions).

c. The total amount to be paid by Settling Defendant pursuant to Subparagraph 53.a shall be deposited in the Oeser Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

54. Payments for Future Response Costs.

a. Settling Defendant shall pay to EPA all Future Response Costs not inconsistent with the National Contingency Plan. On a periodic basis (but at least one year after the Effective Date and no more than annually thereafter) the United States will send Settling Defendant a bill requiring payment that includes a Superfund Cost Recovery Package Imaging and On-Line System (SCORPIOS) or similar cost summary of the direct and indirect costs incurred by EPA and its contractors and a cost summary of costs incurred by DOJ and its contractors, if any. Settling Defendant shall make all payments within 30 days of Settling Defendant's receipt of each bill requiring payment, except as otherwise provided in Paragraph 55. Settling Defendant shall make all payments required by this Paragraph by Electronic Funds Transfer ("EFT") in accordance with EFT instructions provided by EPA, or by submitting a certified cashier's check payable to "EPA Hazardous Substance Superfund", referencing the name and address of the party making the payment, EPA Site/Spill ID Number 104T and DOJ Case Number 90-11-2-07535. Settling Defendant shall send the check to:

Mellon Bank
EPA-Region 10 Superfund

1 P.O. Box 371099M
2 Pittsburgh, PA 15251

3
4 b. At the time of payment, Settling Defendant shall send notice that
5 payment has been made to the United States, to the EPA Project Coordinator and to the
6 Regional Financial Management Officer, in accordance with Section XXVI (Notices and
7 Submissions).

8 c. The total amount paid by Settling Defendant pursuant to
9 subparagraph 54.a will be transferred by EPA to the EPA Hazardous Substance
10 Superfund.

11 d. Within 30 days of the Effective Date, Settling Defendant shall pay
12 to the City of Bellingham an amount of \$500,000. The \$500,000 payment shall be
13 directed to a trust account established by the City of Bellingham ("Bellingham Trust").
14 The funds shall be used only to assist the City and the County, at the direction of the
15 Washington Department of Ecology, to perform any necessary remedial actions related to
16 Little Squalicum Creek and the South Slope under the Model Toxics Control Act. In the
17 event that any funds remain in the Bellingham Trust upon its termination, such funds may
18 be paid to EPA as further reimbursement of its Past Response Costs in accordance with
19 the terms of the Bellingham Trust.

20 55. Settling Defendant may contest payment of any Future Response
21 Costs under Paragraph 54 if it determines that the United States has made an accounting
22 error or if it alleges that a cost item that is included represents costs that are inconsistent
23 with the NCP. Such objection and any request for supporting documentation, limited to
24 the disputed costs, shall be made in writing within 30 days of receipt of the bill, and must
25 be sent to the United States pursuant to Section XXVI (Notices and Submissions). Any

1 such objection shall specifically identify the contested Future Response Costs and the
2 basis for objection. Upon request for supporting documentation, EPA shall provide
3 Settling Defendant with supporting documentation of its costs consistent with EPA policy.
4 In the event of an objection, the Settling Defendant shall within the 30 day period pay all
5 uncontested Future Response Costs to the United States in the manner described in
6 Paragraph 54. Within this 30 day period, the Settling Defendant shall either provide
7 written documentation that funds equivalent to the contested Future Response Costs are
8 available in the Trust Account and/or Control Account set forth in Section XIII
9 (Assurance of Ability to Complete Work) of this Consent Decree or, if insufficient funds
10 are available in such accounts, Settling Defendant shall establish an interest-bearing
11 escrow account in a federally insured bank duly chartered in the State of Washington and
12 remit to that escrow account funds equivalent to the amount of the contested Future
13 Response Costs. The Settling Defendant shall send to the United States, as provided in
14 Section XXVI (Notices and Submissions), documentation regarding the availability of
15 these funds and, in the event an escrow account is established, a copy of the transmittal
16 letter and check paying the uncontested Future Response Costs, and a copy of the
17 correspondence that establishes and funds the escrow account, including but not limited
18 to, information containing the identity of the bank and bank account under which the
19 escrow account is established as well as a bank statement showing the initial balance of
20 the escrow account. Within this same 30 day period, the Settling Defendant shall initiate
21 the Dispute Resolution procedures in Section XIX (Dispute Resolution). If the United
22 States prevails in the dispute, within 5 days of the resolution of the dispute, the Settling
23 Defendant shall pay the sums due (with accrued interest) to the United States in the
24 manner-described in Paragraph 54. If the Settling Defendant prevails concerning any
25 aspect of the contested costs, the Settling Defendant shall pay that portion of the costs

(plus associated accrued interest) for which it did not prevail to the United States in the manner described in Paragraph 54. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XIX (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding the Settling Defendant's obligation to reimburse the United States for its Future Response Costs.

56. In the event that the payments required by Subparagraph 53.a or the payments required by Paragraph 54 are not made when due, Settling Defendant shall pay Interest on the unpaid balance. The Interest to be paid on Past Response Costs under this Paragraph shall begin to accrue on the Effective Date. The Interest on Future Response Costs shall begin to accrue on the date of receipt of the bill. The Interest shall accrue through the date of the Settling Defendant's payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiff by virtue of Settling Defendant's failure to make timely payments under this Section. Settling Defendant shall make all payments required by this Paragraph in the manner described in Paragraph 54.

XVII. INDEMNIFICATION AND INSURANCE

57. Settling Defendant's Indemnification of the United States.

a. The United States does not assume any liability by entering into this Consent Decree or by virtue of any designation of Settling Defendant as EPA's authorized representatives under Section 104(e) of CERCLA. Settling Defendant shall indemnify, save and hold harmless the United States and its officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any

1 persons acting on its behalf or under its control, in carrying out activities pursuant to this
2 Consent Decree, including, but not limited to, any claims arising from any designation of
3 Settling Defendant as EPA's authorized representatives under Section 104(e) of
4 CERCLA. Further, the Settling Defendant agrees to pay the United States all costs it
5 incurs including, but not limited to, attorneys fees and other expenses of litigation and
6 settlement arising from, or on account of, claims made against the United States based on
7 negligent or other wrongful acts or omissions of Settling Defendant, its officers, directors,
8 employees, agents, contractors, subcontractors, and any persons acting on its behalf or
9 under its control, in carrying out activities pursuant to this Consent Decree. The United
10 States shall not be held out as a party to any contract entered into by or on behalf of
11 Settling Defendant in carrying out activities pursuant to this Consent Decree. Neither the
12 Settling Defendant nor any such contractor shall be considered an agent of the United
13 States.

14 b. The United States shall give Settling Defendant notice of any claim
15 for which the United States plans to seek indemnification pursuant to Paragraph 57, and
16 shall consult with Settling Defendant prior to settling such claim.

17 58. Settling Defendant waives all claims against the United States for damages
18 or reimbursement or for set-off of any payments made or to be made to the United States
19 arising from or on account of any contract, agreement, or arrangement between Settling
20 Defendant and any person for performance of Work on or relating to the Site, including,
21 but not limited to, claims on account of construction delays. In addition, Settling
22 Defendant shall indemnify and hold harmless the United States with respect to any and all
23 claims for damages or reimbursement arising from or on account of any contract,
24 agreement, or arrangement between Settling Defendant and any person for performance of
25

1 Work on or relating to the Site, including, but not limited to, claims on account of
2 construction delays.

3 59. No later than 15 days before commencing any on-site Work, Settling
4 Defendant shall secure, and shall maintain until the first anniversary of EPA's
5 Certification of Completion of the Remedial Action pursuant to Subparagraph 49.b of
6 Section XIV (Certification of Completion) comprehensive general liability insurance with
7 limits of one million dollars per occurrence with three million dollars umbrella, combined
8 single limit, and automobile liability insurance with limits of one million dollars,
9 combined single limit, naming the United States as an additional insured. In addition, for
10 the duration of this Consent Decree, Settling Defendant shall satisfy, or shall ensure that
11 their contractors or subcontractors satisfy, all applicable laws and regulations regarding
12 the provision of worker's compensation insurance for all persons performing the Work on
13 behalf of Settling Defendant in furtherance of this Consent Decree. Prior to
14 commencement of the Work under this Consent Decree, Settling Defendant shall provide
15 to EPA certificates of such insurance and a copy of each insurance policy. Settling
16 Defendant shall resubmit such certificates and copies of policies on the anniversary of the
17 Effective Date. If Settling Defendant demonstrates by evidence satisfactory to EPA that
18 any contractor or subcontractor maintains insurance equivalent to that described above, or
19 insurance covering the same risks but in a lesser amount, then, with respect to that
20 contractor or subcontractor, Settling Defendant need provide only that portion of the
21 insurance described above which is not maintained by the contractor or subcontractor.

22 XVIII. FORCE MAJEURE

23 60. "Force majeure," for purposes of this Consent Decree, is defined as any
24 event arising from causes beyond the control of the Settling Defendant, of any entity
25 controlled by Settling Defendant, or of Settling Defendant's contractors, that delays or

1 prevents the performance of any obligation under this Consent Decree despite Settling
2 Defendant's best effort to fulfill the obligation. The requirement that the Settling
3 Defendant exercise "best efforts to fulfill the obligation" includes using best efforts to
4 anticipate any potential force majeure event and best efforts to address the effects of any
5 potential force majeure event (1) as it is occurring and (2) following the potential force
6 majeure event, such that the delay is minimized to the greatest extent possible. "Force
7 Majeure" does not include financial inability to complete the Work or a failure to attain
8 the Performance Standards.

9 61. If any event occurs or has occurred that may delay the performance of any
10 obligation under this Consent Decree, whether or not caused by a force majeure event, the
11 Settling Defendant shall notify orally EPA's Project Coordinator or, in his or her absence,
12 EPA's Alternate Project Coordinator or, in the event both of EPA's designated
13 representatives are unavailable, the Director of the Environmental Cleanup Office, EPA
14 Region 10, within 24 hours of when Settling Defendant first knew that the event might
15 cause a delay if such event may cause an imminent and substantial threat to human health
16 or the environment, or otherwise within 5 days. Within five days thereafter, Settling
17 Defendant shall provide in writing to EPA an explanation and description of the reasons
18 for the delay; the anticipated duration of the delay; all actions taken or to be taken to
19 prevent or minimize the delay; a schedule for implementation of any measures to be taken
20 to prevent or mitigate the delay or the effect of the delay; the Settling Defendant's
21 rationale for attributing such delay to a force majeure event if it intends to assert such a
22 claim; and a statement as to whether, in the opinion of the Settling Defendant, such event
23 may cause or contribute to an endangerment to public health, welfare or the environment.
24 The Settling Defendant shall include with any notice all reasonably available
25 documentation supporting its claim that the delay was attributable to a force majeure.

1 Failure to comply with the above requirements shall preclude Settling Defendant from
2 asserting any claim of force majeure for that event for the period of time of such failure to
3 comply, and for any additional delay caused by such failure. Settling Defendant shall be
4 deemed to know of any circumstance of which Settling Defendant, any entity controlled
5 by Settling Defendant, or Settling Defendant's contractors knew or reasonably should
6 have known.

7 62. If EPA agrees that the delay or anticipated delay is attributable to a force
8 majeure event, the time for performance of the obligations under this Consent Decree that
9 are affected by the force majeure event will be extended by EPA for such time as is
10 necessary to complete those obligations. An extension of the time for performance of the
11 obligations affected by the force majeure event shall not, of itself, extend the time for
12 performance of any other obligation. If EPA does not agree that the delay or anticipated
13 delay has been or will be caused by a force majeure event, EPA will notify the Settling
14 Defendant in writing of its decision. If EPA agrees that the delay is attributable to a force
15 majeure event, EPA will notify the Settling Defendant in writing of the length of the
16 extension, if any, for performance of the obligations affected by the force majeure event.

17 63. If the Settling Defendant elects to invoke the dispute resolution procedures
18 set forth in Section XIX (Dispute Resolution), Settling Defendant may do so after giving
19 EPA written notice of the Force Majeure event. However, Settling Defendant may invoke
20 dispute resolution procedures no later than 15 days after receipt of EPA's decision under
21 Paragraph 62. In any such proceeding, Settling Defendant shall have the burden of
22 demonstrating by a preponderance of the evidence that the delay or anticipated delay has
23 been or will be caused by a force majeure event, that the duration of the delay or the
24 extension sought was or will be warranted under the circumstances, that best efforts were
25 exercised to avoid and mitigate the effects of the delay, and that Settling Defendant

1 complied with the requirements of Paragraphs 60 and 61, above. If Settling Defendant
2 carries this burden, the delay at issue shall be deemed not to be a violation by Settling
3 Defendant of the affected obligation of this Consent Decree identified to EPA and the
4 Court.

5 **XIX. DISPUTE RESOLUTION**

6 64. Unless otherwise expressly provided for in this Consent Decree, the dispute
7 resolution procedures of this Section shall be available and shall be the exclusive
8 mechanism to resolve all disputes arising under or with respect to this Consent Decree.
9 However, the procedures set forth in this Section shall not apply to actions by the United
10 States to enforce obligations of the Settling Defendant that have not been disputed in
11 accordance with this Section.

12 65. Any dispute which arises under or with respect to this Consent Decree shall
13 in the first instance be the subject of informal negotiations between the parties to the
14 dispute. The period for informal negotiations shall not exceed the earlier of 20 days from
15 the time the dispute arises, unless this time limit is modified by written agreement of the
16 parties to the dispute, or Settling Defendant's written notice of termination of the informal
17 negotiation period. The dispute shall be considered to have arisen when one party sends
18 the other party a written Notice of Dispute.

19 66. **Statements of Position.**

20 a. In the event that the parties cannot resolve a dispute by informal
21 negotiations under the preceding Paragraph, then the position advanced by EPA shall be
22 considered binding unless, within twenty (20) days after the conclusion of the informal
23 negotiation period, Settling Defendant invokes the formal dispute resolution procedures of
24 this Section by serving on the United States a written Statement of Position on the matter
25 in dispute, including, but not limited to, any factual data, analysis or opinion supporting

1 that position and any supporting documentation relied upon by the Settling Defendant.
2 The Statement of Position shall specify the Settling Defendant's position as to whether
3 formal dispute resolution should proceed under Paragraph 67 or Paragraph 68.

4 b. Within twenty (20) days after receipt of Settling Defendant's
5 Statement of Position, EPA will serve on Settling Defendant its Statement of Position,
6 including, but not limited to, any factual data, analysis, or opinion supporting that position
7 and all supporting documentation relied upon by EPA. EPA's Statement of Position shall
8 include a statement as to whether formal dispute resolution should proceed under
9 Paragraph 67 or 68. Within ten (10) days after receipt of EPA's Statement of Position,
10 Settling Defendant may submit a Reply.

11 c. If there is disagreement between EPA and the Settling Defendant as
12 to whether dispute resolution should proceed under Paragraph 67 or 68, the parties to the
13 dispute shall follow the procedures set forth in the paragraph determined by EPA to be
14 applicable. However, if the Settling Defendant ultimately appeals to the Court to resolve
15 the dispute, the Court shall determine which paragraph is applicable in accordance with
16 the standards of applicability set forth in Paragraphs 67 and 68.

17 67. Formal dispute resolution for disputes pertaining to the selection or
18 adequacy of any response action and all other disputes that are accorded review on the
19 administrative record under applicable principles of administrative law shall be conducted
20 pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the
21 adequacy of any response action includes, without limitation: (1) the adequacy or
22 appropriateness of plans, procedures to implement plans, or any other items requiring
23 approval by EPA under this Consent Decree; and (2) the adequacy of the performance of
24 response actions taken pursuant to this Consent Decree. Nothing in this Consent Decree
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1 shall be construed to allow any dispute by Settling Defendant regarding the validity of the
2 ROD's provisions.

3 a. An administrative record of the dispute shall be maintained by EPA
4 and shall contain all statements of position, including supporting documentation,
5 submitted pursuant to this Section. When appropriate, EPA may allow submission of
6 supplemental statements of position by the Parties to the dispute, which shall also form a
7 part of the administrative record of the dispute.

8 b. The Director of the Environmental Cleanup Office, EPA Region 10,
9 will issue a final administrative decision resolving the dispute based on the administrative
10 record described in Paragraph 67.a. This decision shall be binding upon the Settling
11 Defendant, subject only to the right to seek judicial review pursuant to Paragraph 67.c and
12 d.

13 c. Any administrative decision made by EPA pursuant to
14 Paragraph 67.b shall be reviewable by this Court, provided that a motion for judicial
15 review of the decision is filed by the Settling Defendant with the Court and served on all
16 Parties within 20 days of receipt of EPA's decision. The motion shall include a
17 description of the matter in dispute, the efforts made by the parties to resolve it, the relief
18 requested, and the schedule, if any, within which the dispute must be resolved to ensure
19 orderly implementation of this Consent Decree. The United States may file a response to
20 Settling Defendant's motion and shall have 20 days to do so.

21 d. In proceedings on any dispute governed by this Paragraph, Settling
22 Defendant shall have the burden of demonstrating that the decision of the Environmental
23 Cleanup Office Director is arbitrary and capricious or otherwise not in accordance with
24 law. Judicial review of EPA's decision shall be on the administrative record of the
25 dispute compiled pursuant to Paragraph 67.a.

1 68. Formal dispute resolution for disputes that neither pertain to the selection
2 or adequacy of any response action nor are otherwise accorded review on the
3 administrative record under applicable principles of administrative law, shall be governed
4 by this Paragraph.

5 a. Following receipt of Settling Defendant's Statement of Position
6 submitted pursuant to Paragraph 66, the Director of the Environmental Cleanup Office,
7 EPA Region 10, will issue a final decision resolving the dispute. The Environmental
8 Cleanup Office Director's decision shall be binding on the Settling Defendant unless,
9 within 20 days of receipt of the decision, the Settling Defendant files with the Court and
10 serves on the Parties a motion for judicial review of the decision setting forth the matter in
11 dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule,
12 if any, within which the dispute must be resolved to ensure orderly implementation of the
13 Consent Decree. The United States may file a response to Settling Defendant's motion.

14 b. Notwithstanding Paragraph L of Section I (Background and
15 Findings) of this Consent Decree, judicial review of any dispute governed by this
16 Paragraph shall be governed by applicable principles of law.

17 69. The invocation of formal dispute resolution procedures under this Section
18 shall not extend, postpone or affect in any way any obligation of the Settling Defendant
19 under this Consent Decree, not directly in dispute, unless EPA agrees or the Court orders
20 otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue
21 but payment shall be stayed pending resolution of the dispute as provided in Paragraph 78.
22 Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of
23 noncompliance with any applicable provision of this Consent Decree. In the event that the
24 Settling Defendant does not prevail on the disputed issue, stipulated penalties shall be
25 assessed and paid as provided in Section XX (Stipulated Penalties).

XX. STIPULATED PENALTIES

70. Settling Defendant shall be liable for stipulated penalties in the amounts set forth in Paragraphs 71 and 72 to the United States for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XVIII (Force Majeure). "Compliance" by Settling Defendant shall include completion of the activities under this Consent Decree or any work plan or other plan approved under this Consent Decree identified below in accordance with all applicable requirements of law, this Consent Decree, the SOW, and any plans or other documents approved by EPA pursuant to this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

71. Stipulated Penalty Amounts Work.

The following stipulated penalties shall accrue per violation per day for any noncompliance with the Work required under this Consent Decree and SOW:

Penalty Per Violation Per Day	Period of Noncompliance
\$100	1st through 14 th day
\$250	15 th through 30 th day
\$500	31 st day and beyond

72. Stipulated Penalty Amounts — Reports.

The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports or other written documents required under this Consent Decree and SOW:

Penalty Per Violation Per Day	Period of Noncompliance
\$100	1st through 14 th day
\$150	15 th through 30 th day
\$200	31 st day and beyond

73. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 87 of Section XXI (Covenants Not to Sue by Plaintiff), Settling Defendant shall be liable for a stipulated penalty in the amount of the cost of performance of such Work performed by EPA.

74. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section XI (EPA Approval of Plans and Other Submissions), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Settling Defendant of any deficiency; (2) with respect to a decision by the Director of the Environmental Cleanup Office, EPA Region 10, under Paragraph 67.b or 68.a of Section XIX (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that Settling Defendant's reply to EPA's Statement of Position is received until the date that the Director issues a final decision regarding such dispute; or, (3) with respect to judicial review by this Court of any dispute under Section XIX (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

1 75. Following EPA's determination that Settling Defendant has failed to
2 comply with a requirement of this Consent Decree, EPA may give Settling Defendant
3 written notification of the same and describe the noncompliance. EPA may send the
4 Settling Defendant a written determination and demand for the payment of the penalties,
5 including a brief explanation. However, penalties shall accrue as provided in the
6 preceding Paragraph regardless of whether EPA has notified the Settling Defendant of a
7 violation.

8 76. All penalties accruing under this Section shall be due and payable to the
9 United States within 30 days of the Settling Defendant's receipt from EPA of a written
10 demand for payment of the penalties, unless Settling Defendant invokes the Dispute
11 Resolution procedures under Section XIX (Dispute Resolution). All payments to the
12 United States under this Section shall be paid by certified or cashier's check(s) made
13 payable to "EPA Hazardous Substances Superfund," shall be mailed to Mellon Bank,
14 EPA-Region 10 Superfund, P.O. Box 371099M, Pittsburgh, PA 15251, shall indicate that
15 the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill
16 ID # 104T, the DOJ Case Number 90-11-2-07535, and the name and address of the party
17 making payment. Copies of check(s) paid pursuant to this Section, and any accompanying
18 transmittal letter(s), shall be sent to the United States as provided in Section XXVI
19 (Notices and Submissions).

20 77. The payment of penalties shall not alter in any way Settling Defendant's
21 obligation to complete the performance of the Work required under this Consent Decree.

22 78. Penalties shall continue to accrue as provided in Paragraph 74 during any
23 dispute resolution period, but need not be paid until the following:
24
25

1 a. If the dispute is resolved by agreement or by a decision of EPA that
2 is not appealed to this Court, accrued penalties determined to be owing shall be paid to
3 EPA within 15 days of the agreement or the receipt of EPA's decision or order;

4 b. If the dispute is appealed to this Court and the United States
5 prevails in whole or in part, Settling Defendant shall pay all accrued penalties determined
6 by the Court to be owed to EPA within 60 days of receipt of the Court's decision or order,
7 except as provided in Subparagraph c below;

8 c. If the District Court's decision is appealed by any Party, Settling
9 Defendant shall pay all accrued penalties determined by the District Court to be owing to
10 the United States into an interest-bearing escrow account within 60 days of receipt of the
11 Court's decision or order. Penalties shall be paid into this account as they continue to
12 accrue, at least every 60 days. Within 15 days of receipt of the final appellate court
13 decision, the escrow agent shall pay the balance of the account to EPA or to Settling
14 Defendant to the extent that it prevails.

15 79. If Settling Defendant fails to pay stipulated penalties when due, the United
16 States may institute proceedings to collect the penalties, as well as interest. Settling
17 Defendant shall pay Interest on the unpaid balance, which shall begin to accrue on the
18 date of demand made pursuant to Paragraph 76, subject to limitations of Paragraph 74.

19 80. Nothing in this Consent Decree shall be construed as prohibiting, altering,
20 or in any way limiting the ability of the United States to seek any other remedies or
21 sanctions available by virtue of Settling Defendant's violation of this Decree or of the
22 statutes and regulations upon which it is based, including, but not limited to, penalties
23 pursuant to Section 122(1) of CERCLA, provided, however, that the United States shall
24 not seek civil penalties pursuant to Section 122(1) of CERCLA for any violation for
25

1 which a stipulated penalty is provided herein, except in the case of a willful violation of
2 the Consent Decree.

3 81. Notwithstanding any other provision of this Section, the United States may,
4 in its unreviewable discretion, waive any portion of stipulated penalties that have accrued
5 pursuant to this Consent Decree.

6 XXI. COVENANTS NOT TO SUE BY PLAINTIFF

7 82. In consideration of the actions that will be performed and the payments that
8 will be made by the Settling Defendant under the terms of the Consent Decree, and except
9 as specifically provided in Paragraphs 83, 84, and 86 of this Section, the United States
10 covenants not to sue or to take administrative action against Settling Defendant pursuant
11 to Sections 106 and 107(a) of CERCLA relating to the Site. Except with respect to future
12 liability, these covenants not to sue shall take effect upon the receipt by EPA of the
13 payments required by Paragraph 53.a of Section XVI (Payments for Response Costs).
14 With respect to future liability, these covenants not to sue shall take effect upon
15 Certification of Completion of Remedial Action by EPA pursuant to Paragraph 49.b of
16 Section XIV (Certification of Completion). These covenants not to sue are conditioned
17 upon the satisfactory performance by Settling Defendant of its obligations under this
18 Consent Decree. These covenants not to sue extend only to the Settling Defendant and do
19 not extend to any other person, unless the Consent Decree is amended to add a subsequent
20 purchaser pursuant to Paragraph 9(c).

21 83. United States' Pre-Certification Reservations. Notwithstanding any other
22 provision of this Consent Decree, the United States reserves, and this Consent Decree is
23 without prejudice to, the right to institute proceedings in this action or in a new action, or
24 to issue an administrative order seeking to compel Settling Defendant to perform further
25

1 response actions relating to the Site, or to reimburse the United States for additional costs
2 of response; if prior to Certification of Completion of the Remedial Action:

3 a. conditions at the Site, previously unknown to EPA, are discovered

4 or

5 b. information, previously unknown to EPA, is received, in whole or
6 in part;

7 and EPA determines that these previously unknown conditions or information together
8 with any other relevant information indicates that the Remedial Action is not protective of
9 human health or the environment.

10 84. United States' Post-certification Reservations. Notwithstanding any other
11 provision of this Consent Decree, the United States reserves, and this Consent Decree is
12 without prejudice to, the right to institute proceedings in this action or in a new action, or
13 to issue an administrative order seeking to compel Settling Defendant to perform further
14 response actions relating to the Site, or to reimburse the United States for additional costs
15 of response if, subsequent to Certification of Completion of the Remedial Action:

16 a. conditions at the Site, previously unknown to EPA, are discovered,

17 or,

18 b. information, previously unknown to EPA, is received, in whole or
19 in part;

20 and EPA determines that these previously unknown conditions or this information
21 together with other relevant information indicate that the Remedial Action is not
22 protective of human health or the environment.

23 85. For purposes of Paragraph 83, the information and the conditions known to
24 EPA shall include:

1 a. With respect to Little Squalicum Creek and the South Slope, only
2 that information and those conditions known to EPA as of the date EPA signed this
3 Consent Decree and set forth in the Site File; and

4 b. in all other respects, only that information and those conditions
5 known to EPA as of the date the ROD was signed and set forth in the Record of Decision
6 for the Site and the administrative record supporting the Record of Decision.

7 For purposes of Paragraph 84, the information and the conditions known to EPA shall
8 include only that information and those conditions known to EPA as of the date of
9 Certification of Completion of the Remedial Action and set forth in the Record of
10 Decision, the administrative record supporting the Record of Decision, the post-ROD
11 administrative record, or in any information received by EPA pursuant to the requirements
12 of this Consent Decree prior to Certification of Completion of the Remedial Action.

13 86. General reservations of rights. The United States reserves, and this
14 Consent Decree is without prejudice to, all rights against Settling Defendant with respect
15 to all matters not expressly included within Plaintiff's covenant not to sue.
16 Notwithstanding any other provision of this Consent Decree, the United States reserves all
17 rights against Settling Defendant with respect to:

18 a. claims based on a failure by Settling Defendant to meet a
19 requirement of this Consent Decree;

20 b. liability arising from the past, present, or future disposal, release, or
21 threat of release of Waste Material outside of the Site;

22 c. liability for future disposal of Waste Material at the Site other than
23 as provided in the ROD, Work or otherwise ordered by EPA pursuant to this Consent
24 Decree;

- 1 d. liability for damages for injury to, destruction of, or loss of natural
2 resources, and for the costs of any natural resource damage assessments;
- 3 e. criminal liability;
- 4 f. liability for violations of federal or state law which occur during or
5 after implementation of the Remedial Action; and
- 6 g. liability, prior to Certification of Completion of the Remedial
7 Action, for additional response actions that EPA determines are necessary to achieve
8 Performance Standards, but that cannot be required pursuant to Paragraph 13
9 (Modification of the SOW or Related Work Plans);

10 87. Work Takeover. In the event EPA determines that Settling Defendant has
11 ceased implementation of any portion of the Work, is seriously or repeatedly deficient or
12 late in its performance of the Work, or is implementing the Work in a manner which may
13 cause an endangerment to human health or the environment, EPA may assume the
14 performance of all or any portions of the Work as EPA determines necessary. Settling
15 Defendant may invoke the procedures set forth in Section XIX (Dispute Resolution),
16 Paragraph 67, to dispute EPA's determination that takeover of the Work is warranted
17 under this Paragraph. Costs incurred by the United States in performing the Work
18 pursuant to this Paragraph shall be considered Future Response Costs that Settling
19 Defendant shall pay pursuant to Section XVI (Payment for Response Costs).

20 88. Notwithstanding any other provision of this Consent Decree and without
21 prejudice to any defenses available to Settling Defendant, the United States retains all
22 authority and reserves all rights to take any and all response actions authorized by law.
23
24
25

XXII. COVENANTS BY SETTLING DEFENDANT

89. Covenant Not to Sue. Subject to the reservations in Paragraph 90 and except as allowed in accordance with the dispute resolution process of this Consent Decree, Settling Defendant hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States with respect to the Site or this Consent Decree, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law;

b. any claims against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Site, or

c. any claims arising out of response actions at or in connection with the Site including any claim under the United States Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law.

These covenants not to sue shall not apply in the event that the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 83, 84, 86(b) - (d) or 86(g), but only to the extent that Settling Defendant's claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation; provided, however, that nothing in this paragraph affects the enforceability of Paragraph 96 (waiver of Claim-Splitting Defenses).

1 90. The Settling Defendant reserves, and this Consent Decree is without
2 prejudice to, claims against the United States, subject to the provisions of Chapter 171 of
3 Title 28 of the United States Code, for money damages for injury or loss of property or
4 personal injury or death caused by the negligent or wrongful act or omission of any
5 employee of the United States while acting within the scope of his office or employment
6 under circumstances where the United States, if a private person, would be liable to the
7 claimant in accordance with the law of the place where the act or omission occurred.
8 However, any such claim shall not include a claim for any damages caused, in whole or in
9 part, by the act or omission of any person, including any contractor, who is not a federal
10 employee as that term is defined in 28 U.S.C. § 2671; nor shall any such claim include a
11 claim based on EPA's selection of response actions, or the oversight or approval of the
12 Settling Defendant's plans or activities. The foregoing applies only to claims which are
13 brought pursuant to any statute other than CERCLA and for which the waiver of
14 sovereign immunity is found in a statute other than CERCLA.

15 91. Nothing in this Consent Decree shall be deemed to constitute
16 preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C.
17 § 9611, or 40 C.F.R. § 300.700(d).

18 XXIII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

19 92. Nothing in this Consent Decree shall be construed to create any rights in,
20 or grant any cause of action to, any person not a Party to this Consent Decree. The
21 preceding sentence shall not be construed to waive or nullify any rights that any person
22 not a signatory to this decree may have under applicable law. Each of the Parties
23 expressly reserves any and all rights (including, but not limited to any right to
24 contribution), defenses, claims demands and causes of action that each Party may have
25

1 with respect to any matter, transaction, or occurrence relating in any way to the Site
2 against any person not a Party hereto.

3 93. The Parties agree, and by entering this Consent Decree this Court finds,
4 that the Settling Defendant is entitled, as of the Effective Date, to protection from
5 contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C.
6 §§ 9613(f)(2) for matters addressed in this Consent Decree. The term “matters addressed”
7 in this Consent Decree shall mean: (a) all previous information gathered and response
8 actions performed by EPA or its contractors relating to the Site (this includes but is not
9 limited to all costs previously incurred by EPA, the 1996 and 1997 assessments, the time-
10 critical removal action and Remedial Investigation/Feasibility Study); (b) the Work
11 required by this Consent Decree; (c) the Past, Interim, and Future Response Costs as
12 defined herein and to be settled pursuant to this Consent Decree; and (d) all response costs
13 incurred or to be incurred or response actions performed or to be performed by any person
14 addressing releases that had occurred on the Site as of the date the ROD was signed. The
15 “matters addressed” in this Consent Decree do not include those response costs or
16 response actions as to which the United States has reserved its rights under this Consent
17 Decree, in the event that the United States asserts rights against Settling Defendant
18 coming within the scope of such reservations.

19 94. The Settling Defendant agrees that with respect to any suit or claim for
20 contribution brought by it for matters related to this Consent Decree it will notify the
21 United States Department of Justice in writing no later than 60 days prior to the initiation
22 of such suit or claim. The failure to comply with this paragraph shall not subject Settling
23 Defendant to stipulated penalties under Section XX.

24 95. The Settling Defendant also agrees that with respect to any suit or claim for
25 contribution brought against it for matters related to this Consent Decree it will notify in

1 writing the United States within 20 days of service of the complaint on it. In addition,
 2 Settling Defendant shall notify the United States within 20 days of service or receipt of
 3 any Motion for Summary Judgment and within 20 days of receipt of any order from a
 4 court setting a case for trial.

5 96. In any subsequent administrative or judicial proceeding initiated by the
 6 United States for injunctive relief, recovery of response costs, or other appropriate relief
 7 relating to the Site, Settling Defendant shall not assert, and may not maintain, any defense
 8 or claim based upon the principles of waiver, res judicata, collateral estoppel, issue
 9 preclusion, claim-splitting, or other defenses based upon any contention that the claims
 10 raised by the United States in the subsequent proceeding were or should have been
 11 brought in the instant case; provided, however, that nothing in this Paragraph affects the
 12 enforceability of the covenants not to sue set forth in Section XXI (Covenants Not to Sue
 13 by Plaintiff).

14 XXIV. ACCESS TO INFORMATION

15 97. Settling Defendant shall provide to EPA, upon request, copies of all
 16 documents and information within its possession or control or that of its contractors or
 17 agents relating to the implementation of this Consent Decree, including, but not limited to,
 18 sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports,
 19 sample traffic routing, correspondence, or other documents or information related to the
 20 Work. Settling Defendant shall also make available to EPA, for purposes of investigation,
 21 information gathering, or testimony, its employees, agents, or representatives with
 22 knowledge of relevant facts concerning the performance of the Work.

23 98. Business Confidential and Privileged Documents.

24 a. Settling Defendant has in the past and may in the future assert
 25 business confidentiality claims covering part or all of the documents or information

1 submitted to Plaintiff under this Consent Decree to the extent permitted by and in
2 accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R.
3 § 2.203(b). Documents or information determined to be confidential by EPA will be
4 afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of
5 confidentiality accompanies documents or information when they are submitted to EPA,
6 or if EPA has notified Settling Defendant that the documents or information are not
7 confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2,
8 Subpart B, the public may be given access to such documents or information without
9 further notice to Settling Defendant. Settling Defendant may, at any time prior to the
10 public release of such document, rectify the inadvertent failure to designate documents or
11 information as business confidential by so notifying EPA in writing.

12 b. The Settling Defendant may assert that certain documents, records
13 and other information are privileged under the attorney-client privilege or any other
14 privilege recognized by federal law. If the Settling Defendant asserts such a privilege in
15 lieu of providing documents, it shall provide the Plaintiff with the following: (1) the title
16 of the document, record, or information; (2) the date of the document, record, or
17 information; (3) the name and title of the author of the document, record, or information;
18 (4) the name and title of each addressee and recipient; (5) a general description of the
19 contents of the document, record, or information; and (6) the privilege asserted by Settling
20 Defendant. However, no documents, reports or other information required to be created
21 pursuant to the Consent Decree, SOW or other approved deliverables shall be withheld on
22 the grounds that they are privileged.

23 99. No claim of confidentiality shall be made with respect to any data,
24 including, but not limited to, all sampling, analytical, monitoring, hydrogeologic,
25

1 scientific, chemical, or engineering data, or any other documents or information
2 evidencing conditions at or around the Site.

3 XXV. RETENTION OF RECORDS

4 100. Until 10 years after the Settling Defendant's receipt of EPA's notification
5 pursuant to Paragraph 50.b of Section XIV (Certification of Completion of the Work), the
6 Settling Defendant shall preserve and retain all non-identical copies of records and
7 documents (including records or documents in electronic form) now in its possession or
8 control or which come into its possession or control that relate in any manner to its
9 liability under CERCLA with respect to the Site, provided, however, that Settling
10 Defendant must retain, in addition, all documents and records that relate to the liability of
11 any other person under CERCLA with respect to the Site. The Settling Defendant must
12 also retain, and instruct its contractors and agents to preserve, for the same period of time
13 specified above all non-identical copies of the last draft or final version of any documents
14 or records (including documents or records in electronic form) now in its possession or
15 control or which come into its possession or control that relate to the performance of the
16 Work, provided, however, that the Settling Defendant (and its contractors and agents)
17 must retain, in addition, copies of all data (e.g. raw data, QA reports, sampling reports)
18 generated during the performance of the Work and not contained in the aforementioned
19 documents required to be retained. Each of the above record retention requirements shall
20 apply regardless of any corporate retention policy to the contrary. The failure to comply
21 with this paragraph shall not subject Settling Defendant to stipulated penalties under
22 Section XX .

23 101. At the conclusion of this document retention period, Settling Defendant
24 shall notify the United States at least 90 days prior to the destruction of any such records
25 or documents, and, upon request by the United States, Settling Defendant shall deliver any

1 such records or documents to EPA. The Settling Defendant may assert that certain
2 documents, records and other information are privileged under the attorney-client
3 privilege or any other privilege recognized by federal law. If the Settling Defendant
4 asserts such a privilege, the Settling Defendant shall provide the Plaintiff with the
5 following: (1) the title of the document, record, or information; (2) the date of the
6 document, record, or information; (3) the name and title of the author of the document,
7 record, or information; (4) the name and title of each addressee and recipient; (5) a
8 description of the subject of the document, record, or information; and (6) the privilege
9 asserted by Settling Defendant. However, no documents, reports or other information
10 required to be created by the Consent Decree, SOW or other approved deliverables shall
11 be withheld on the grounds that they are privileged.

12 102. The Settling Defendant hereby certifies that, to the best of its knowledge
13 and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or
14 otherwise disposed of any records, documents or other information (other than identical
15 copies) relating to its potential liability regarding the Site since notification of potential
16 liability by the United States on July 2, 1997 or the filing of suit against it regarding the
17 Site and that it has fully complied with any and all EPA requests for information pursuant
18 to Section 104(e) and 122(e) of CERCLA, 42 U.S. C. 9604(e) and 9622(e), and
19 Section 3007 of RCRA, 42 U.S.C. 6927.

20 XXVI. NOTICES AND SUBMISSIONS

21 103. Whenever, under the terms of this Consent Decree, written notice is
22 required to be, given or a report or other document is required to be sent by one Party to
23 another, it shall be directed to the individuals at the addresses specified below, unless
24 those individuals or their successors give notice of a change to the other Parties in writing.
25 All notices and submissions shall be considered effective upon receipt, unless otherwise

1 provided. Written notice as specified, herein shall constitute complete satisfaction of any
2 written notice requirement of the Consent Decree with respect to the United States, EPA,
3 and the Settling Defendant, respectively.

4 As to the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources
Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Re: DJ #90-11-2-07535

8 And

9 Director, Environmental Cleanup Office
10 United States Environmental Protection
Agency
Region 10
11 1200 Sixth Avenue
Seattle, Washington 98101

12 As to EPA:

Mary Jane Nearman
EPA Project Coordinator
United States Environmental Protection
Agency ECL 115
Region 10
1200 Sixth Avenue
Seattle, Washington 98101

13 As to the Regional Financial Management Officer:

Financial Management Officer
U.S. EPA
Region 10 (OMP-146)
1200 Sixth Avenue
Seattle, WA 98101

1
2 As to the Settling Defendant:

Christopher M. Secrist
President of Oeser
PO Box 156
Bellingham, WA 98227

4 Settling Defendant's Project Coordinator
5 The Retec Group Inc
6 1011 SW Klickitat Way
Suite 207

7 Seattle, WA 98134-1162

8 With a copy to:

William H. Chapman, Preston Gates Ellis, LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104

11 XXVII. EFFECTIVE DATE

12 104. The effective date of this Consent Decree shall be the date upon which this
13 Consent Decree is entered by the Court, except as otherwise provided herein.

14 XXVIII. RETENTION OF JURISDICTION

15 105. This Court retains jurisdiction over both the subject matter of this Consent
16 Decree and the Settling Defendant for the duration of the performance of the terms and
17 provisions of this Consent Decree for the purpose of enabling any of the Parties to apply
18 to the Court at any time for such further order, direction, and relief as may be necessary or
19 appropriate for the construction or modification of this Consent Decree, or to effectuate or
20 enforce compliance with its terms, or to resolve disputes in accordance with Section XIX
21 (Dispute Resolution) hereof.

22 XXIX. APPENDICES

23 106. The following appendices are attached to and incorporated into this
24 Consent Decree

25 "Appendix A" is the ROD.

1 “Appendix B” is the SOW.

2 “Appendix C” is the trust fund agreement.

3 “Appendix D” is the Control Agreement.

4 XXX. COMMUNITY RELATIONS

5 107. Settling Defendant shall propose to EPA its participation in the community
6 relations plan to be developed by EPA. EPA will determine the appropriate role for the
7 Settling Defendant under the Plan. Settling Defendant shall also cooperate with EPA in
8 providing information regarding the Work to the public. As requested by EPA, Settling
9 Defendant shall participate in the preparation of such information for dissemination to the
10 public and in public meetings which may be held or sponsored by EPA to explain
11 activities at or relating to the Site.

12 XXXI. MODIFICATION

13 108. Schedules specified in this Consent Decree for completion of the Work
14 may be modified by agreement of EPA and the Settling Defendant. All such
15 modifications shall be made in writing.

16 109. Except as provided in Paragraph 13 (Modification of the SOW or Related
17 Work Plans), no material modifications shall be made to the SOW without written
18 notification to and written approval of the United States, Settling Defendant, and the
19 Court, if such modifications fundamentally alter the basic features of the selected remedy
20 within the meaning of 40 C.F.R. 300.435(c)(2)(B)(ii). Modifications to the SOW that do
21 not materially alter that document, or material modifications to the SOW that do not
22 fundamentally alter the basic features of the selected remedy within the meaning of 40
23 C.F.R. 300.435(c)(2)(B)(ii), may be made by written agreement between EPA and the
24 Settling Defendant.
25

110. Nothing in this Decree shall be deemed to alter the Court's power to enforce, supervise, or approve modifications to this Consent Decree.

XXXII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

111. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Consent Decree without further notice.

112. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XXXIII. SIGNATORIES/SERVICE

113. The undersigned representative of Settling Defendant and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

114. Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States has notified the Settling Defendant in writing that it no longer supports entry of the Consent Decree.

115. Settling Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this

1 Consent Decree. Settling Defendant hereby agrees to accept service in that manner and to
2 waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil
3 Procedure and any applicable local rules of this Court, including, but not limited to,
4 service of a summons. The parties agree that Settling Defendant need not file an answer
5 to the complaint in this action unless or until the court expressly declines to enter this
6 Consent Decree.

7 XXXIV. FINAL JUDGMENT

8 116. This Consent Decree and its appendices constitute the final, complete, and
9 exclusive agreement and understanding among the parties with respect to the settlement
10 embodied in the Consent Decree. The parties acknowledge that there are no
11 representations, agreements or understandings relating to the settlement other than those
12 expressly contained in this Consent Decree.

13 117. Upon approval and entry of this Consent Decree by the Court, this Consent
14 Decree shall constitute a final judgment between and among the United States and the
15 Settling Defendant. The Court finds that there is no just reason for delay and therefore
16 enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

17
18
19 SO ORDERED THIS 7th DAY OF November, 2005.
20

21
22
23 

24 United States District Judge
25

1 THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United
2 States v. The Oeser Company, relating to the Oeser Superfund Site.

3
4
5 **FOR THE UNITED STATES OF AMERICA**

6
7 _____
8 Date

_____ **KELLY A. JOHNSON**
Acting Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

9
10
11 _____
12 Date

_____ **CYNTHIA M. FERGUSON**
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Telephone: (202) 616-6560
Fax: (202) 514-4180
Email: cynthia.ferguson@usdoj.gov

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16
17 **JOHN MCKAY**
United States Attorney
Western District of Washington

18
19
20 **BRIAN C. KIPNIS**
Assistant United States Attorney
U.S. Department of Justice
700 Stewart Street
Suite 5220
Seattle, WA 98101-1271
Telephone: (206) 553-7970

1 THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United
2 States v. The Oeser Company, relating to the Oeser Superfund Site.

3
4 _____
Date

Ron Kreizenbeck
Acting Regional Administrator,
Region 10
U.S. Environmental Protection Agency
1220 Sixth Avenue
Seattle, Washington 98101

8
9 _____
Date

Cynthia L. Mackey
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 10
1220 Sixth Avenue
Seattle, Washington 98101

1 THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United
2 States v. The Oeser Company, relating to the Oeser Superfund Site.

3
4 **FOR THE OESER COMPANY**

5
6
7 _____
Date Signature: _____
8 Christopher M. Secrist
9 President of The Oeser Company
730 Marine Drive; Bellingham WA 98225
PO Box 156; Bellingham, WA 98227

10 Agent Authorized to Accept Service on Behalf of Above-signed Party:

11
12 Name (print): William H. Chapman
13 Title: _____
14 Address: Preston Gates Ellis, LLP
925 Fourth Avenue, Suite 2900
Seattle, Washington 98104
15 Ph. Number: (206) 623-7580